Supreme Court, U.S.
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88-700

No. .....

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

SCOTT JONATHAN CORWIN,
Petitioner,
VS.
PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

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QUESTIONS PRESENTED

1. WHEN DOES A SEARCH WARRANT AFFIDAVIT BECOME SO FACTUALLY DEFICIENT AS TO BRING IT WITHIN THE EXCEPTION OF *UNITED STATES v. LEON* (1984) 468 U.S. 97 [82 L.Ed.2d 677, 104 S.Ct. 3405] THAT THE GOOD FAITH RULE DOES NOT APPLY WHEN THE AFFIDAVIT IS "SO LACKING IN INDICIA OF PROBABLE CAUSE AS TO RENDER OFFICIAL BELIEF IN ITS EXISTENCE ENTIRELY UNREASONABLE"?

2. DOES THE *LEON* GOOD FAITH RULE REQUIRE SOME INDEPENDENT INVESTIGATION BY A POLICE OFFICER WHEN THE ONLY OTHER INFORMATION IS PROVIDED BY A CONFIDENTIAL INFORMANT?

   A. ALTERNATIVELY, CAN OBJECTIVE GOOD FAITH EXIST WHEN THE POLICE HAVE NOT CONDUCTED AN INDEPENDENT INVESTIGATION TO CONFIRM INFORMATION PROVIDED BY A CONFIDENTIAL INFORMANT?

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No. .....

In the Supreme Court

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OCTOBER TERM, 1988

SCOTT JONATHAN CORWIN,
Petitioner,
VS.
PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

Scott Jonathan Corwin petitions for a Writ of Certiorari to review the judgment of the California Supreme Court in this case.

OPINION BELOW

The California Supreme Court denied review of the unpublished opinion of the Court of Appeals of the State of California which affirmed Mr. Corwin's conviction for possession for sale of cocaine. This unpublished opinion is identified as Appendix B to Mr. Corwin's Petition for Review to the California Supreme Court. (Appendix, pages 30c-36c).

JURISDICTION

The judgment of the California Supreme Court was entered on August 25, 1988. The jurisdiction of this Court

is invoked under 28 U.S.C. § 1257(3). Pursuant to Supreme Court Rule 20.1, this petition is timely filed if filed by October 25, 1988.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides in pertinent part:

> "The right of the people to be secure in their persons, houses . . . against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause . . ."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

FACTUAL STATEMENT OF THE CASE

A. The Search Warrant

On November 23, 1984, Officer Scott Bixby of the Culver City Police Department executed a search warrant at 2901 Sepulveda Avenue, apartment 139, in the City and County of Los Angeles which resulted in the seizure of approximately five and one-third grams of cocaine. That warrant authorized Officer Bixby to search apartment 139 for, *inter alia*, cocaine and paraphernalia associated with the storage and use of cocaine. (The warrant and supporting affidavit are attached to Mr. Corwin's Petition for Review to the California Supreme Court; Appendix, pages 23c-28c.)

The statement of probable cause in support of the search warrant affidavit is two and one-half pages in length. Only eight lines, however, are devoted to the factual basis for the affidavit. They consist of very general information provided by a confidential informant who told Officer Bixby:

> "[T]hat a male white known to the CRI only as "SCOTT", is selling one gram quantities of cocaine from his residence located at 2901 Sepulveda Boulevard, #139, Los Angeles, California. The CRI stated that the residence is on the west side of Sepulveda Blvd. north of National Blvd. The CRI stated that he/she had seen a quantity of cocaine contained within a clear plastic baggie inside the residence inside the residence [sic] on at least one occasion within three days prior to your affiant receiving this information from the CRI. The CRI described "SCOTT" as a male, white, 5-8, 135 lbs., short dark brown hair, brown eyes, and is approximately 25 years of age." (Appendix, pages 26c and 27c)

Officer Bixby formed the opinion in the affidavit that the informant was knowledgeable as to what cocaine looks like and the manner in which it is packaged and that the informant was also a cocaine user. He further stated that the informant had, within the past month, given him information on three prior occasions which had led to the arrest of three narcotic dealers and the seizure of "substantial amounts of narcotics." *Officer Bixby provided no other information to support the informant's statement.* Neither he nor any other police officer conducted an independent investigation of the informant's story. Approximately five and one-third grams of cocaine were seized upon execution of the search warrant.

B. Legal Proceedings

The District Attorney of Los Angeles County charged Mr. Corwin with a violation of Health and Safety Code section 11351, possession for sale of the five and one-third grams of cocaine.

Mr. Corwin moved to quash the warrant and the results of its execution on the basis, *inter alia,* that it had been issued without a sufficient showing of probable cause in violation of his Fourth Amendment rights, the supporting information was "stale" and that the search warrant could not be saved by the "good faith" test.

The trial judge held that he would not have signed the warrant because it was deficient as to whether or not the informant was speaking from personal knowledge. (R.T. 3-4.) He stated that he would have questioned the affiant as to what he knew about the source of the informant's story that "SCOTT" was selling cocaine. The judge then granted the Appellant's motion to quash the warrant.

The judge next discussed the application of the *United States v. Leon,* 468 U.S. 97, 82 L.Ed.2d 677, 104 S.Ct. 3405, "good faith test" to the search warrant. Although he had substantial doubts about the officer's performance,[1] he still held that the police officer had been acting in good faith in accepting the magistrate's determination that the affidavit was sufficient to the issuance of the warrant. (R.T. 6-7.)

Mr. Corwin then withdrew his plea of not guilty and pled *nolo contendere* to the charge. He was granted probation for the offense on May 22, 1987. Mr. Corwin appealed

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[1]"There is a lot about this case that isn't right. There is a lot about the officer's performance that is hardly in the textbook for police activity." (R.T. 86.)

to the California Court of Appeal, Second Appellate District, from that judgment of conviction and from the denial of his motion to suppress the results of the search warrant. The Court of Appeal denied Mr. Corwin's appeal in a non-published opinion on June 1, 1988. (Appendix) Mr. Corwin's petition for rehearing was denied by the Court on June 23, 1988. (Appendix) The California Supreme Court then denied, on August 25, 1988, without opinion, Mr. Corwin's Petition for Review. (Appendix).

REASONS FOR GRANTING THIS PETITION

In *United States v. Leon, supra,* 468 U.S. at pages 922-923, the Court appended substantial exceptions to the conclusion "that the marginal or non-existent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion." One exception was that "an officer (could not) manifest objective good faith in relying on a warrant based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable' ".

Since *Leon*, however, *no court has provided a bright line as to when an affidavit becomes so lacking in indicia of probable cause as to render objective good faith in its existence entirely unreasonable.* The result is that police officers, prosecutors, defense counsel and the courts are not sure when this exception applies. The benefits of such a bright line ruling would improve the quality of search warrants and provide a guideline for judges when applying the good faith rule.

The "bare bones" search warrant in this case provides this Court with an excellent opportunity to define the outer limits of the good faith exception because the supporting

affidavit is based only upon ambiguous and conclusionary statements by a confidential informant with no independent investigation having been conducted by the police agency.

This case also presents this Court with an opportunity to decide if *Aguilar-Spinelli* guidelines for the determination of an informant's credibility and reliability are still applicable if the *Illinois v. Gates* (1983) 462 U.S. 213 [76 L.Ed.2d 527, 103 S.Ct. 2317] "totality of the circumstances" analysis cannot be applied because of the failure of the police to conduct any independent investigation in support of the informant's allegations. A resolution of this issue would benefit law enforcement in those situations where time constraints prevent it from actively investigating the informant's claims.

In summary, then, the facts of this case present a classic opportunity for this Court to present a primer to police officers, prosecutors, defense lawyers and judges on the basic and fundamental requirements for a search warrant affidavit in light of the *Gates* and *Leon* decisions.

REASONS FOR GRANTING REVIEW

A. It is not Reasonable to Rely on the Alleged Probable Cause in the Instant Affidavit

The core of the two and a half page affidavit in support of the search warrant is found in the eight lines which set forth totally uncorroborated information by an informant which is so lacking in detail that it cannot establish probable cause. It is a long established rule that a search warrant affidavit containing only the opinions and conclusions of the affiant, without disclosure of the underlying facts, will not constitute probable cause supported by oath or affirmation as required by the Fourth Amendment of the United States Constitution. (*See Nathanson v.*

United States (1933) 290 U.S. 41, 47, 78 L.Ed.2d 159, 54 S.Ct. 11 and *Aguilar v. Texas* (1964) 378 U.S. 108, 114-115, 12 L.Ed.2d 723, 84 S.Ct. 1509.) The remainder of the affidavit refers to Officer Bixby's prior training as a police officer, his opinion that the informant knows both what cocaine looks like and is familiar with the manner in which it is packaged, that the informant is a cocaine user and the fact that the informant had provided information on three prior occasions which had resulted in the seizure of narcotics and the arrest of three narcotic dealers.

An informant may neither be reliable nor credible yet the "totality of the circumstances" in the warrant may be sufficient to establish probable cause for the issuance of the warrant. That was the situation in *Illinois v. Gates* (1983) 462 U.S. 213, 76 L.Ed.2d 527, 103 S.Ct. 2317 and it was, likewise, the situation in *Massachusetts v. Upton* (1984) 466 U.S. 727, 80 L.Ed.2d 721, 104 S.Ct. 2085.

In *Upton,* an initially anonymous informant who was identified by the affiant in the search warrant gave detailed information as to the existence and location of stolen property. The affiant followed up that phone call by corroborating the existence of some facts related by the informant and attaching confirming police reports of prior burglaries along with a list of the stolen property. The Court applied the totality of circumstances test and found probable cause for the issuance of the warrant although

> "[n]o single piece of evidence in it is conclusive. But the pieces fit neatly together and, so viewed, support the Magistrate's determination that there was 'fair probability that contraband or evidence of a crime would be found in Upton's motor home.' (Citation.) The informant claimed to have seen the stolen goods and gave a description of them which tallied with the

> items taken in recent burglaries. She knew of the raid on the motel room — which produced evidence connected to those burglaries — and that the room had been reserved by Kelleher. She explained the connection between Kelleher's motel room and the stolen goods at Upton's motor home. And she provided a motive both for her attempt at anonymity — fear of Upton's retaliation — and for furnishing the information — her recent breakup with Upton and her desire 'to burn him'." (466 U.S. at pp. 727-733-734; 80 L.Ed.2d at pp. 721-727-728)

Therefore,

> "[t]he informant's story and the surrounding facts possessed an internal coherence that gave weight to the whole." (466 U.S. at p. 734; 80 L.Ed.2d at p. 728)

The instant affidavit deserves no comparable interpretation. The pieces do not fit neatly together. There are no surrounding facts to provide an internal coherence that gives weight to the whole. There are no totality of circumstances by which to judge the quality and breadth of the probable cause. Everything rises and falls upon the informant's uncorroborated broad allegation, a story which the trial court judge had seriously questioned and found wanting.

B. For the *Leon* Good Faith Rule to be Operative, the Police Must Conduct an Independent Investigation When the Only Other Information is Provided by a Confidential Informant

Doubts as to the informant's basis of knowledge, reliability and credibility are substantial. They may be resolved, however, if there had been corroboration by some independent police investigation. Without it, there are no

totality of the circumstances to evaluate the informant's credibility and reliability.

> "Our decisions applying the totality of the circumstances analysis . . . have consistently recognized the value of corroboration of details of an informant's tip by independent police work. In *Jones v. United States* 362 U.S. at p. 269, 4 L.Ed.2d 697, 80 S.Ct. 725, 78 A.L.R.2d 233, we held that an affidavit relying on hearsay 'is not to be deemed insufficient on that score, so long as a substantial basis for crediting the hearsay is presented.' We went on to say that even in making a warrantless arrest an officer 'may rely upon information received through an informant, rather than upon his direct observations, so long as the informant's statement is reasonably corroborated by other matters within the officer's knowledge.' (Citation.) Likewise, we recognized the probative value of corroborative efforts of police officials in *Aguilar* — the source of the 'two-pronged test' by observing that if the police had made some effort to corroborate the informant's report at issue, 'an entirely different case would have been presented.' (Citation.)" (*Illinois v. Gates, supra,* 462 U.S. at pp. 241-242, 76 L.Ed.2d at p. 550; 103 S.Ct. at p. 2334.)

For the above reasons, application of the good faith exception requires presentation of facts about the manner in which the officers pursued their investigation. A "bare bones" warrant, such as the police relied on here, is insufficient to bring this rule into play. (*Illinois v. Gates, supra,* 462 U.S. at p. 239; *United States v. Barrington* (5th Cir. 1986) 806 F.2d 529, 531.) There is in this instance no investigation to analyze. For this reason, alone, the good faith exception does not apply. Officer Bixby did not attempt to corroborate in any way the information pro-

vided by the informant. He did not conduct a utility check of apartment 139 to learn the identity of the subscriber of services. That information would not only have told him whether or not a person by the name of "SCOTT" was living in apartment 139 but also would have given him a name which he could have run through police records to see if that person had a prior arrest record. Officer Bixby did not conduct a surveillance of the apartment to see whether or not there was substantial foot traffic which would corroborate the informant's allegation that sales of cocaine were taking place at that location. Officer Bixby did not attempt to stop or detain any persons leaving apartment 139 to see whether or not they were in possession of contraband. Officer Bixby did not attempt to have the informant make a controlled buy or, alternatively, introduce undercover police officers for the purpose of making a buy.

C. *Aguilar-Spinelli* Guidelines Must Be Used to Determine the Credibility and Reliability of an Informant When There Are No Supporting Totality of Circumstances to Evaluate the Credibility of the Informant

Since there are no totality of the circumstances to evaluate the informant's story, it is necessary to judge the issue of the affidavit's probable cause by the existence or non-existence of the informant's veracity, reliability and basis of knowledge.

Illinois v. Gates, supra, abrogated the two-pronged *Aguilar-Spinelli* test for the purposes of evaluating the credibility of informants and imposed, instead, a totality of the circumstances standard. The same standard is to be used to determine the existence of good faith as an exception to a faulty warrant. (*United States v. Leon, supra,* 468 U.S. at p. 915, 82 L.Ed.2d at p. 694.) Although

the "totality of the circumstances" no longer includes the "two-pronged test", an informant's veracity, reliability and basis of knowledge are still highly relevant factors in determining the value of his report. (*Illinois v. Gates, supra,* 462 U.S. at p. 230, 76 L.Ed.2d at p. 543.) These factors "should be understood simply as closely intertwined issues that may usefully eliminate the common sense, practical question whether there is 'probable cause' to believe the contraband or evidence is located in a particular case." (*Id.* at p. 230 and at p. 543.) Therefore, the two-pronged test is still relevant in the determination of probable cause. (*United States v. Estrada* (9th Circ. 1984) 733 F.2d 683, 685.)

Appellant is not suggesting that a search warrant, to be lawful, must always be supported by an independent police investigation. Under certain circumstances, even without an independent investigation, an informant can be reliable or credible. (Those circumstances do not exist here.) The *Gates* rule, however, does not provide for such an analysis. This appeal, therefore, presents this Court with an opportunity to hold that *Aguilar-Spinelli* standards may still be referred to in the absence of any totality of the circumstances.

D. Prior Information by this Unreliable Informant, to be Sufficient for Establishing his Reliability, Should have Led to Case Filings, Held To Answer Decisions by Magistrates or Convictions

The California Appellate Court held that the informant was "reliable" because he/she had provided information in the past month which had led to the seizures of substantial amounts of narcotics and the arrest of three

narcotics dealers.[2] This ruling makes sense and is legally consistent *only* if there were other facts to support the informant's reliability. (*United States v. Colon* (2nd Cir. 1969) 419 F.2d 120, 122.) The totality of circumstances test, in effect, says the same thing — look at the total picture and not just one isolated factor in determining an informant's reliability and credibility.

But, in this instance, there are no other supporting factors, no independent investigation, no sufficient showing of personal knowledge. When this occurs, the need to corroborate prior information from the informant regarding unrelated suspects becomes stronger. No longer is a resulting arrest enough. "The better view [should be] that a bald assertion that the informant's prior information prompted the police to make one or more arrests will not suffice to establish the informant's credibility." (1 W. LaFave, *Search and Seizure* § 3.3, at 514 (1978)). What is needed is evidence that the arrests led to case filings, held to answer rulings by a magistrate or even convictions.

Otherwise, no independent, reasonable person has reviewed the informant's story and found it to be accurate or reliable. In the absence of such third party analysis, the police officer decides whether or not the informant was credible and reliable. Whether or not the prior information was accurate becomes irrelevant in this scheme. Whether or not those arrests and seizures were supported by probable cause is not to be considered. The officer's self-fulfilling prophecy of the informant's reliability then becomes the only standard as to whether the warrant has been issued upon probable cause.

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[2]"The affidavit set forth information and observations provided to the officer who had proved reliable in narcotics investigations in the recent past." (Appendix B, p. 6.)

E. An Objective Good Faith Belief on the Part of the Police Officer is not Established Merely Because A Magistrate Has Signed the Search Warrant and Supporting Affidavit.

Since the search warrant has an absence of supporting facts or investigation, some prosecutors may attempt to argue that this problem is negated by the magistrate's having signed the warrant.

This proposition, however, is legally incorrect. In *Malley v. Briggs* (1986) 475 U.S. 335, 345-346, 89 L.Ed.2d 271, 281, 106 S.Ct. 1092, the Court rejected the argument that the petitioning police officer was entitled to rely on the judgment of a judicial law officer in issuing the warrant.

> "This view of objective reasonableness is at odds with our development of that concept in *Harlow* and *Leon*. In *Leon*, we stated that 'our good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization.' (Citation omitted.) The analogous question in this case is whether a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant. (fn. omitted.) If such was the case, the officer's application for a warrant was not objectively reasonable, because it created the unnecessary danger of an unlawful arrest. It is true that in an ideal system an unreasonable request for a warrant would be harmless, because no judge would approve it. But ours is not an ideal system, and it is possible that a magistrate, working under docket pressures, will fail to perform as a magistrate should. We find it

reasonable to require the officer applying for the warrant to minimize this danger by exercising reasonable professional judgment.[9]

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[9]"Notwithstanding petitioner's protestations, the rule we adopt in no way 'requires the police officer to assume a role even more skilled . . . than the magistrate.' (Petitioner's brief reference omitted.) It is a sound presumption that 'the magistrate is more qualified than the police officer to make a probable cause determination', ibid, and it goes without saying where a magistrate acts mistakenly in issuing a warrant but within the range of professional competence of a magistrate, the officer who requested the warrant cannot be held liable. But it is different if no officer of reasonable competence would have requested the warrant, i.e., his request is outside the range of the professional competence expected of an officer. If the magistrate issues the warrant in such a case, his action is not just a reasonable mistake, but an unacceptable error indicating gross incompetence or neglect of duty. The officer then cannot excuse his own default by pointing to the greater incompetence of the magistrate."

The *Malley* rule was applied to a criminal case in *United States v. Hove* (9th Cir. 1988) 848 F.2d 137 where the Court held that reasonable reliance by the police officer on the signing of the warrant by the magistrate was not sufficient to raise the good faith exception because "[w]hen the officers have not presented a colorable showing, and the warrant and affidavit on their face preclude reasonable reliance, the reasoning of *Leon* does not apply." (*Id.* at p. 140.)

The *Malley-Hove* holdings are sound from a policy point of view because it would be too easy, otherwise, for prosecutors to insulate the good faith rule from critical analysis by merely arguing that the officer was entitled to rely upon the magistrate's having signed the warrant.

F. To Determine the Existence or Non-Existence of Objective Good Faith, A Reviewing Court Must Examine the Supporting Facts in the Affidavit

The Petitioner pointed out in detail to the California Court of Appeal that objective belief in the existence of probable cause to support the search warrant was unreasonable because:

> (1) There was no personal knowledge for the informant's allegation that "Scott" was selling cocaine and that he lived at 2901 Sepulveda Boulevard, apartment 139, Los Angeles, California;
>
> (2) The informant's observation of "a quantity of cocaine" was an unsupported conclusion;
>
> (3) The informant provided no detail to give credence to his/her allegation that "Scott" was selling cocaine and that "a quantity of cocaine" was in apartment 139;
>
> (4) The unreliable informant's prior information had not led to case filings, held to answer decisions or convictions;
>
> (5) The information as to possession of a quantity of cocaine was stale;
>
> (6) There were no "totality of circumstances" to consider other than the informant's broad allegations; and

(7) There was no independent police investigation for the purposes of establishing the informant's veracity or shoring up the problems in numbers (1) through (4). Nevertheless, the Court of Appeal, *ignored* all of these substantial facts and upheld the warrant without analysis. Contrary to that opinion, it would appear that the facts of a warrant *must be examined* when a good faith issue is raised. Otherwise, the Petitioner's due process rights, as well as his right against unreasonable searches and seizures, have been violated.

CONCLUSION

The California Supreme Court erroneously denied review of the California Appellate Court's affirmation of Mr. Corwin's conviction. This conviction was obtained only as a result of a "bare bones" search warrant affidavit which was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. It is not enough that the magistrate signed this faulty warrant. That act, by itself, is not enough to invalidate Petitioner's Fourth Amendment rights. But this type of problem shall continue to persist unless the Court provides a bright line as to when probable cause becomes objectively unreasonable.

Respectfully submitted,

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Appendix A

2ND CRIM. NO.

B028330

In the Court of Appeal

OF THE

State of California

SECOND APPELLATE DISTRICT

DIVISION TWO

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

VS.

SCOTT JONATHAN CORWIN,
Defendant and Appellant.

Appeal from Superior Court of Los Angeles County,
Honorable Leslie W. Light, Judge.
2nd Crim. No. A090739

APPELLANT'S OPENING BRIEF

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2ND CRIM. NO. B028330

In the Court of Appeal

OF THE

State of California

SECOND APPELLATE DISTRICT

DIVISION TWO

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

VS.

SCOTT JONATHAN CORWIN,
Defendant and Appellant.

Appeal from Superior Court of Los Angeles County,
Honorable Leslie W. Light, Judge.
2nd Crim. No. A090739

APPELLANT'S OPENING BRIEF

I.

STATEMENT OF THE CASE

The Defendant and Appellant, Scott Jonathan Corwin, was charged by the Los Angeles County District Attorney's Office with a violation of Health and Safety Code section 11351, possession for sale of cocaine. After his motion to quash the search warrant was both granted and denied by the Court, pursuant to Penal Code section 1538.5(a)(2)(III) and (IV), Mr. Corwin withdrew his plea of not guilty to the information on March 30, 1987 and pled nolo contendere to the charge. Mr. Corwin was

granted probation for the offense on May 22, 1987. He appeals from that judgment of conviction (Penal Code section 1237) and from the denial of his motion to suppress the results of the search warrant.

II.

FACTUAL STATEMENT OF THE CASE

A. The Search Warrant and Affidavit

On November 23, 1984, Officer Scott Bixby of the Culver City Police Department executed a search warrant at 2901 Sepulveda Avenue, apartment 139, in the City and County of Los Angeles (R.T. 9) which resulted in the seizure of approximately five and one-third grams of cocaine (C.T. 18). That warrant authorized Officer Bixby to search Apartment 139 for, *inter alia,* cocaine and paraphernalia associated with the storage and use of cocaine. (Search Warrant and Affidavit.)

The statement of probable cause in support of the search warrant affidavit is two and one-half pages in length. *Only eight lines, however, are devoted to the factual basis for the affidavit. They consist of very general information provided by a confidential informant* who told Officer Bixby:

> "[T]hat a male white known to the CRI only as "SCOTT", is selling one gram quantities of cocaine from his residence located at 2901 Sepulveda Boulevard #139, Los Angeles, California. The CRI stated that the residence is on the west side of Sepulveda Blvd north of National Blvd. The CRI stated that he/she had seen a quantity of cocaine contained within a clear plastic baggie inside the residence inside the residence [sic] on at least one

> occasion within three days prior to your affiant receiving this information from the CRI. The CRI described 'SCOTT' as a male, white, 5-8, 135 lbs., short dark brown hair, brown eyes, and is approximately 25 years of age." (Affidavit, page A-4, lines 3-11.)

Officer Bixby formed the opinion in the affidavit that the informant was knowledgeable as to what cocaine looks like and the manner in which it is packaged and that the informant was also a cocaine user. He further stated that the informant had, within the past month, given him information on three prior occasions which had led to the arrest of three narcotic dealers and the seizure of "substantial amounts of narcotics." (Affidavit, page A-4, lines 13-21.) Officer Bixby provided no other information to support the informant's statement. *Neither he nor any other police officer conducted an independent investigation of the informant's story.*

B. The Police Entry at 2901 Sepulveda Boulevard, Apartment 139

Six police officers arrived at the location to execute the warrant. Officer Bixby knocked on the door and stated that he was a police officer with a search warrant and requested that the occupants open the door. (R.T. 10 and 12.) He was advised by another officer that a man inside had looked out the back door and had then shut it. (R.T. 12.) Officer Bixby then knocked again on the door and said that he was a police officer with a search warrant. (R.T. 13.) *He heard no sounds from within the apartment between his first and second identification and request for admission.* (R.T. 13.) *After the second notification, Officer Bixby heard some noise from within the apartment* (R.T. 14) *which was no louder than footsteps.* (R.T. 23.) He did

not know the direction of the footsteps — whether they were going to or from the door. (R.T. 14 and 35.) The police then used a metal ram to break down the door. (R.T. 14.) *Only 20 to 30 seconds elapsed from the first time Officer Bixby had said "Police Officers" and the door was broken down.* (R.T. 15.)

Officer Bixby justified the forceful entry on the basis that he believed evidence was being destroyed and/or people inside were arming themselves. (R.T. 24.) He had no information, however, that there were any weapons inside the residence or that Scott Corwin was a violent person. (R.T. 24.) Officer Bixby testified that his reason for believing that evidence was being destroyed was "due to the fact that the first time I announced who I was I received information that someone from inside the house was looking out the back door. And the fact that the second time I announced myself, still nobody opened the door. And based upon the information I had, it's very common for people to get rid of evidence, flush the narcotics down the toilet and/or arm themselves." (R.T. 33:20-26.) He did not justify his actions at all on the unobtrusive footsteps.

Mr. Corwin testified at the suppression hearing that he had heard a normal knock (R.T. 40 and 46) and asked, in response, "Who is it?" (R.T. 41 and 48.) He received no response to this question. (R.T. 41, 47, 48 and 51.) After he had heard a second knock, he walked to the door (R.T. 48) and asked, once more, "Who is it?" (R.T. 41.) Again, he received no answer. (R.T. 58.) The door then came off the hinges. (R.T. 41.) Ten seconds passed between the first knock and the door coming off the hinges. (R.T. 43-44 and 50-51.)

Mr. Corwin also stated that the floor on which he had walked was carpeted and thick (R.T. 44) and that he was

barefoot. (R.T. 45.) The other occupant of the apartment, a female, did not walk around during this period. (R.T. 45.). He also testified that he had not opened the sliding door to the apartment during this period of time. (R.T. 60.)

C. The Penal Code § 1538.5 Hearing

Mr. Corwin moved to quash the warrant and the results of its execution on the basis that the warrant had been issued without a sufficient showing of probable cause, the supporting information was "stale", the search warrant could not be saved by the "good faith" test and that the police had violated Penal Code § 1531 in their entry of the apartment.

Judge Leslie Light, the trial judge, was not sure whether the affidavit indicated that "Scott" or a third person was selling cocaine. (R.T. 1-2.) He then speculated that the informant could have been given the information by someone else or that the informant could have become aware of it through his own personal knowledge — that he had either purchased the contraband or had observed it being purchased. (R.T. 2.) Judge Light concluded that the informant had, in effect, stated that "I heard the occupant of this apartment was selling cocaine. I was in the apartment very recently and I saw some cocaine in the quantity that supported that information." (R.T. 19-22.) On that basis, *Judge Light held that he would not have signed the warrant. He would have questioned the affiant as to what he knew about the source of the informant's story that "Scott" was selling cocaine.* (R.T. 3-4.) "I would have required that the affiant indicate that either the informant had personal knowledge without going into what the background was, and if necessary, perhaps would have inquired of the affiant as to the

nature of it." (R.T. 4.) He then granted the Appellant's motion to quash the warrant. (R.T. 4.)

Judge Light next discussed the application of the *United States v. Leon* (1984) 468 U.S. 897 [82 L.Ed.2d 677, 104 S.Ct. 3405] "good faith test" to the search warrant. In reviewing the issue, he improperly relied upon *People v. Rivera* (1987) 186 Cal.App.3d 1276 (R.T. 5-7), even though he knew that a rehearing had been granted as to the case, in finding that the good faith test had been met.[1]

> "As far as *Rivera* is concerned, I find the language in that opinion to pretty well express my feelings about this situation. That is I've got a case here where I can see different judges having different opinions than I do on the question of whether *Gates* applies to this affidavit.
>
> "And if that's true, *I don't see how you can possibly in the absence of actual bad faith by the officer indicate that a police officer would not be acting in good faith if he relied on a warrant issued on the basis of that affidavit.*
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> * * *

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[1]A re-hearing had been granted as to *Rivera I* on December 2, 1986, almost four months before Judge Light's reliance on it. In this decision, Division Six of the Second District reversed the trial court's decision to suppress the results of a search warrant because it passed the objective good faith test. Subsequently, in *Rivera II* (190 Cal.App.3d 1591), the Court reversed itself and approved the granting of the motion to suppress and affirmed the trial court's dismissal of the case. The Court found neither probable cause nor objective "good faith" to support the search warrant. *Rivera II* was "depublished" on July 30, 1987 pursuant to Cal.Const., Art VI, § 14, rule 976, Cal. Rules of Ct.

"I do believe that under the *Gates* rationale that a magistrate could and in this case, this magistrate did come to the conclusion that what was being said was as I indicated previously, C.R.I. was told by some third party that the defendant was selling cocaine. And that upon going to the defendant's apartment, having recently — he saw an amount of cocaine that confirmed that hearsay.

"But I'm not willing to find in my eyes that that is sufficient to *Gates*. But I think it's so close that *I can hardly turn around and say that the police officer was not acting in good faith in believing and accepting the magistrate's determination that this affidavit was sufficient to the issuance of this warrant.* So the motion to suppress is denied." (R.T. 6-7.)

The court concluded that the entry of the apartment had occurred as Officer Bixby had testified. (R.T. 85.) Judge Light then ruled that "a sufficient time had elapsed, under the circumstances, creating in the officer a reasonable feeling that there was a distinct possibility that either evidence was going to be disposed of, or the officer's safety would be further endangered." (R.T. 86:4-8.)

In summing up, Judge Light also concluded that "*[t]here is a lot about this case that isn't right. There is a lot about the officer's performance that is hardly in the textbook for police activity.*" (R.T. 86.)

III.

ISSUES ON APPEAL

1. The trial court's erroneous application of a subjective good faith standard was prejudicial.

2. The search warrant affidavit does not meet the objective good faith test because it is based upon brief, general allegations by a confidential informant which were not corroborated by any independent investigation. In other words, there are no totality of circumstances to evaluate the informant's reliability or credibility.

3. The police did not give Mr. Corwin enough time to answer the door before breaking in.

4. There were insufficient facts to justify a forceful entry into apartment 139.

IV.

THE TRIAL COURT ERRONEOUSLY APPLIED A SUBJECTIVE GOOD FAITH STANDARD IN EVALUATING THE SEARCH WARRANT

The trial judge erroneously believed that he could not suppress the fruits of the search warrant "in the absence of actual bad faith" by Officer Bixby. *United States v. Leon, supra,* 468 U.S. at p. 919 fn. 20, 82 L.Ed.2d at p. 696, on the other hand, had clearly enunciated that *the standard of reasonableness (i.e., good faith) is an objective one.*[2]

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[2]"20. We emphasize that the standard of reasonableness we adopt is an objective one. Many objections to a good faith exception assume that the exception will turn on the subjective good faith of individual officers. 'Grounding the modification in objective reasonableness, however, retains the value of the exclusionary rule as an incentive for the law enforcement profession as a whole to conduct themselves in accord with the Fourth Amendment.' (Citations.) The objective standard we adopt, moreover, requires officers to have a reasonable knowledge of what the law prohibits. *United States v. Peltier*, 422 U.S. 531, 542, 45 L.Ed.2d 374, 95 S.Ct. 2313 (1975)."

Since the trial court applied an erroneous standard in determining whether or not "good faith" supported the warrant, the question then becomes whether that error was prejudicial? (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 105, 710-711; 87 S.Ct. 824].)

The answer to that question is clearly "Yes" because there is a reasonable possibility that the error complained of led to the court's finding of good faith and thereby affected Mr. Corwin's substantial rights. (*Id.*, 386 U.S. 18, 23; 17 L.Ed.2d 705, 710.) Judge Light expressed much hesitation in upholding the warrant.[3] Had he followed the objective standard, which includes an analysis as to whether the affidavit is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable" (*United States v. Leon, supra,* 468 U.S. 897, 923; 82 L.Ed.2d 677, 699), he would have held that *it was unreasonable to find probable cause established by the brief, generalized, possibly hearsay allegations of a cocaine-using confidential and unreliable informant whose statements were totally unsupported by any independent police investigation.*

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[3]"*I would not have signed the warrant.* (R.T. 3:26.) "... I think *it's so close* that I can hardly turn around and say that the police officer was not acting in good faith in believing and accepting the magistrate's determination that this affidavit was sufficient to the issuance of this warrant." (R.T. 7:24-28.)

V.

THE AFFIDAVIT IN SUPPORT OF THE WARRANT WAS SO LACKING IN INDICIA OF PROBABLE CAUSE AS TO RENDER OFFICIAL BELIEF IN ITS EXISTENCE ENTIRELY UNREASONABLE

A. Lack of Probable Cause is an Exception to the Leon Good Faith Rule

In *United States v. Leon, supra,* 468 U.S. at pp. 922-923, 82 L.Ed.2d at pp. 698-699, the Court appended substantial exceptions to its conclusion "that the marginal or non-existent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion."

> "We do not suggest, however, that exclusion is always inappropriate in cases where an officer has obtained a warrant and abided by its terms . . . *[T]he officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable (Citation) and it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued.*
>
> "Suppression therefore remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth. (Citation.) The exception we recognize today will also not apply in cases where the issuing magistrate wholly abandoned his judicial role in the manner condemned in *Lo-Ji Sales, Inc. v. New York,* 442 U.S. 319, 60 L.Ed.2d 920, 99 S.Ct. 2319 (1979); in such circum-

stances, no reasonably well-trained officer should rely on a warrant. *Nor would an officer manifest objective good faith in relying on a warrant based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable'.* (Citations.) Finally, depending on the circumstances of the particular case, a warrant may be so facially deficient — i.e., in failing to particularize the place to be searched or the things to be seized — that the executing officers cannot reasonably presume it to be valid. (Citation.)" (Emphasis included.)

B. It is Not Reasonable to Rely on the Alleged Probable Cause in the Instant Affidavit

The core of the two and a half page affidavit in support of the search warrant is found in the eight lines which set forth totally uncorroborated information by an informant which is so lacking in detail that it cannot establish probable cause. The remainder of the affidavit refers to Officer Bixby's prior training as a police officer, his opinion that the informant knows both what cocaine looks like and is familiar with the manner in which it is packaged, that the informant is a cocaine user and the fact that the informant had provided information on three prior occasions which had resulted in the seizure of narcotics and the arrest of three narcotic dealers.

An informant may neither be reliable nor credible yet the "totality of the circumstances" in the warrant may be sufficient to establish probable cause for the issuance of the warrant. That was the situation in *Illinois v. Gates* (1983) 462 U.S. 213, 76 L.Ed.2d 527, 103 S.Ct. 2317 (see fn. 4) and it was, likewise, the situation in *Massachusetts*

v. Upton (1984) 466 U.S. 727, 80 L.Ed.2d 721, 104 S.Ct. 2085.

In *Upton,* an initially anonymous informant who was identified by the affiant in the search warrant gave *detailed* information as to the existence and location of stolen property. The affiant followed up that phone call by *corroborating* the existence of some facts related by the informant and attaching confirming police reports of prior burglaries along with a list of the stolen property. The Court applied the totality of circumstances test and found probable cause for the issuance of the warrant although

> "[n]o single piece of evidence in it is conclusive. But *the pieces fit neatly together* and, so viewed, support the Magistrate's determination that there was 'fair probability that contraband or evidence of a crime would be found in Upton's motor home. (Citation.) The informant claimed to have seen the stolen goods and gave a description of them which tallied with the items taken in recent burglaries. She knew of the raid on the motel room — which produced evidence connected to those burglaries — and that the room had been reserved by Kelleher. She explained the connection between Kelleher's motel room and the stolen goods in Upton's motor home. And she provided a motive both for her attempt at anonymity — fear of Upton's retaliation — and for furnishing the information — her recent breakup with Upton and her desire 'to burn him'." (466 U.S. at pp. 727-733-734; 80 L.Ed.2d at pp. 721-727-728; emphasis included.)
>
> . . .

> Therefore, *"[t]he informant's story and the surrounding facts possessed an internal coherence that gave weight to the whole."* (466 U.S. at p. 734; 80 L.Ed.2d at p. 728; emphasis included.)

The instant affidavit deserves no comparable interpretation. The pieces do not fit neatly together. There are no surrounding facts to provide an internal coherence that gives weight to the whole. There are no totality of circumstances by which to judge the quality and breadth of the probable cause. Everything rises and falls upon the informant's uncorroborated broad allegation, a story which the trial court judge had seriously questioned and found wanting.

C. The Informant is Neither Reliable Nor Credible And There is Only a Partial Basis for His/Her Knowledge

Since there are no totality of circumstances to evaluate the informant's story, it is necessary to judge the issue of the affidavit's probable cause by the existence or nonexistence of the informant's veracity, reliability and basis of knowledge.[4]

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[4]*Illinois v. Gates, supra*, 462 U.S. 213, 76 L.Ed.2d 527, 103 S.Ct. 2317 abrogated the two-prong *Aguilar-Spinelli* test for the purpose of evaluating the credibility of informants. The standard is now one of the "totality of the circumstances" surrounding the warrant. This same standard is to be used to determine whether "good faith" exists as an exception to a faulty warrant. (*United States v. Leon, supra*, 468 U.S. at p. 915, 82 L.Ed.2d at p. 694.) Although the "totality of circumstances" no longer includes the "two-prong test", an informant's veracity, reliability and basis of knowledge are still highly relevant factors in determining the value of his report. (*Illinois v. Gates, supra*, 462 U.S. at p. 230, 76 L.Ed.2d at p. 543.) These factors "should be understood simply as closely intertwined issues that may usefully illuminate the common sense, practical question whether there is 'probable cause' to believe that contraband or evidence is

There is no reference in the affidavit as to the informant's motive for providing the information. We know that the informant is a cocaine user. Certainly, it is reasonable to believe that he/she was not motivated by feelings of good citizenship in telling Officer Bixby the story. It is more probable that he/she received some kind of benefit from the officer — either a payment of money or a promise of leniency as to a pending arrest or prosecution.[5] The informant's cocaine use also potentially impairs his/her ability to perceive and recall details. For example, was the informant "under the influence" of cocaine at the time that he/she heard the sales allegation and saw the "quantity of cocaine"?

The informant's statement is also totally lacking in the type of detail which Massachusetts v. Upton found compelling and necessary. (The need for an "explicit and de-

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located in a particular case." (*Id.* at p. 230 and at p. 543.) Therefore, the two-prong test is still relevant to the determination of probable cause. (*United States v. Estrada* (9th Cir. 1984) 733 F.2d 683, 685.)

[5]"[E]xperienced stool pigeons or persons criminally involved or disposed are not regarded as 'citizen-informants' *because they are generally motivated by something other than good citizenship.* (Citations.)"

"Such persons frequently have criminal records and a history of contact with the police. Often they are free only on probation or parole or are themselves the focus of pending criminal charges or investigations. All familiar with law enforcement know that the tips they provide may reflect their vulnerability to police pressure or may involve revenge, braggadocio, self-exculpation, or the hope of compensation (Citations) . . ." (*People v. Kurland* (1980) 28 Cal.3d 376, 392.) Therefore, *information provided by such informants is suspect on its face.* (*People v. Lopez* (1985) 173 Cal.App.3d 125, 134.) Consequently, "[b]oth an issuing magistrate and a reviewing court must initially assume that information from such sources is unreliable for purposes of probable cause." (*People v. Kurland, supra,* 28 Cal.3d at p. 393; *People v. Lopez, supra,* 173 Cal.App.3d at p. 134.)

tailed description" is especially important when there is a doubt as to the informant's motives. *Illinois v. Gates, supra,* 462 U.S. at p. 234, 76 L.Ed.2d at p. 545.) The informant first broadly stated that a male white by the name of "Scott" was selling one gram quantities of cocaine from his residence at 2901 Sepulveda Boulevard, apartment 139 in Los Angeles. This part of the statement is additionally troublesome, as Judge Light noted, because we are not sure whether it is based upon hearsay or personal knowledge.

The informant then told Officer Bixby only that he/she had seen "a quantity of cocaine contained within a clear plastic baggie" inside "Scott's" residence. *There is no reason given why the informant concluded that the substance he/she saw was cocaine.* His/her only other source of information in this regard was apparently hearsay. The fact that the informant is a cocaine user does not solve the riddle because a plain white powder (assuming that this is what he/she saw) in a clear plastic baggie can be different things — lawful (e.g., baking powder) as well as unlawful. Therefore, *more information is needed to provide the requisite detail.* What did the substance look like?; did he/she see the substance being used?; was it being prepared for sale?; was it being sold?; where was "Scott" when he/she saw the "cocaine"?; did "Scott" make any statements about the powder?; did he/she see drug paraphernalia? *There is, however, no reference as to the amount of this alleged "cocaine". There is no reference to the existence of paraphernalia used in the packaging or sale of cocaine. There is no reference to what was being done with this substance.*

There is also no reference as to who else was present when the informant allegedly saw the "cocaine". Was the informant alone in the apartment when he/she saw it? Was this

observation made when a large number of people were present? The failure to provide this information is critical, too, because *the substance, even if it was contraband, could very well have belonged to any number of people — none of whom had any permanent connection with apartment 139.*

This failure of detail is critical for four reasons. Without any supporting detail, the informant's observation becomes nothing more than a gross, unsupported conclusion. Secondly, a large amount of the substance and/or the presence of paraphernalia would confirm the probability that "Scott" was distributing the contraband rather than using it for his own personal use. Such detail would also confirm the probability that a subsequent search (in this case, six days later) of the location would be likely to reveal the contraband. Finally, and most important, information as to amount, use, statements and paraphernalia would provide the type of detail which the courts require for the purposes of evaluating an informant's veracity and reliability. Unfortunately, we do not have that detail and are left merely with an unsupported conclusion and the ambiguous term "quantity". Such lack of detail, then, equals lack of reliability. (*Illinois v. Gates, supra,* 462 U.S. at p. 242, fn. 12; 76 L.Ed.2d at p. 551, fn. 12.)

The *only* effort by the police to establish the informant's reliability is a representation that the informant had, on three prior occasions, provided information "which resulted in the seizures of substantial amounts of narcotics and the arrest of three narcotic dealers" within the past month. That statement is equally notable for what it fails to include — whether or not those arrests and seizures led to criminal filings by a prosecuting agency (i.e., whether or not they were *valid* arrests and seizures). This is an important and necessary considera-

tion because *arrests and seizures, based upon informant information, by themselves, which have not led to filings do not establish that the informant is reliable.*

"In order to establish the reliability of an informant, it is not necessary to relate that his prior information led to convictions. *It is sufficient that the prior information was accurate or was 'of such substance as to cause a reasonable person to conclude that it is reliable.'* . . . (Therefore), "information from an informant who had twice previously provided police with tips that had led to arrests and *trial* was sufficiently reliable to establish probable cause for an arrest. Prior information that had proved accurate in leading to two *valid* arrests was also held to be sufficient to establish reliability in *People v. Richardson* (1970) 6 Cal.App.3d 70 [85 Cal.Rptr. 607]." (*People v. Durham* (1973) 9 Cal.3d 871, 876; emphasis included.)

In *People v. Superior Court (Johnson)* (1972) 6 Cal.3d 704, a factually detailed affidavit included a representation that an informant had provided information in the past which had led to an arrest but that no one had yet been held to answer or convicted, as a result, because neither the preliminary hearing or trial had yet been held. Although this information from the informant "was not so strong a showing as would be the case where the person arrested has been held to answer or convicted, the affidavit contained an explanation that no preliminary hearing or trial had taken place; and *the fact that the arrest was made and the charges had not been dismissed would constitute some substantiation of the informant's reliability.*" (*Id.* at p. 714.)

The need, then, for a criminal filing or, even better, a held to answer decision by a magistrate or conviction is necessary and reasonable because otherwise no independent, reasonable person has reviewed the informant's

story and found it to be accurate or reliable. In the absence of such third party analysis, the police officer decides whether or not the informant was credible and reliable. Whether or not the prior information was accurate becomes irrelevant. Whether or not those arrests and seizures were supported by probable cause is not to be considered. The Supreme Court, however, could see the error of such a course and required some independent validation for prior arrests or seizures rather than rely on the police officer's self-fulfilling prophecy that the informant was reliable.

It is probable that Officer Bixby realized that he could not, for Fourth Amendment reasons, bring these other arrests to a prosecutor's attention or, alternatively, that the applicable prosecuting agency declined prosecution because of search and seizure problems or failure of proof. Either situation would adversely reflect upon the credibility of the informant. However, even the existence of prosecution filings is not always a sufficient indication of the informant's reliability. (See *United States v. Freitas* (9th Cir. 1983) 716 F.2d 1216, 1221 and 1222 where the Court held that providing information which had led to at least fifteen *indictments* was not enough to show that the informant was reliable.)

D. The Failure of the Police to Conduct an Independent Investigation Further Undercuts the Existence of Objective Good Faith

At this point of the analysis, then, there are substantial doubts as to both the informant's basis of knowledge, reliability and credibility. Such doubts may be resolved *if* there has been corroboration by some independent police investigation. Without it, there are no totality of circum-

stances to evaluate the informant's credibility and reliability.

> "Our decisions applying the totality-of-the circumstances analysis . . . have consistently recognized the *value of corroboration* of details of an informant's tip by *independent police work.* In *Jones v. United States* 362 U.S. at p. 269, 4 L.Ed.2d 697, 80 S.Ct. 725, 78 A.L.R.2d 233, we held that an affidavit relying on hearsay 'is not to be deemed insufficient on that score, so long as a *substantial basis* for crediting the hearsay is presented.' We went on to say that even in making a warrantless arrest an officer 'may rely upon information received through an informant, rather than upon his direct observations, so long as the informant's statement is *reasonably corroborated by other matters within the officer's knowledge.*' (Citation.) Likewise, we recognized the probative value of corroborative efforts of police officials in *Aguilar* — the source of the 'two-pronged test' by observing that if the police had made some effort to corroborate the informant's report at issue, 'an entirely different case would have been presented. (Citation.)" (*Illinois v. Gates, supra,* 462 U.S. at pp. 241-242 [76 L.Ed.2d at p. 550; 103 S.Ct. at p. 2334].)

For the above reasons, *application of the good faith exception customarily requires presentation of facts about the manner in which the officers pursued their investigation. (Higgason v. Superior Court* (1985) 170 Cal.App.3d 929, 944.) *There is, however, in this instance no investigation to analyze. For this reason, alone, the good faith exception does not apply.* Officer Bixby did not attempt to corroborate in any way the information provided by the informant. He did not conduct a utility check of apartment 139 to learn the identity of the subscriber of services. That

information would not only have told him whether or not a person by the name of "Scott" was living in apartment 139 but also would have given him a name which he could run through police records to see if that person had a prior arrest record. Officer Bixby did not conduct a surveillance of the apartment to see whether or not there was substantial foot traffic which would corroborate the informant's allegation that sales of cocaine were taking place at that location. Officer Bixby did not attempt to stop or detain any persons leaving apartment 139 to see whether or not they were in possession of contraband. Officer Bixby did not attempt to have the informant make a controlled buy or, alternatively, introduce undercover police officers for the purpose of making a buy.

E. The Informant's Story is Stale

Probable cause was not established in the affidavit that the quantity of cocaine would still be at apartment 139 six days later when the warrant was executed. (Within three days prior to the time that the informant said that "Scott" was selling cocaine, he/she allegedly saw a "quantity of cocaine" in apartment 139. The statement about the sale was made within three days of the execution of the search warrant. Therefore, as much as six days elapsed between the informant's alleged view of the "quantity of cocaine" and the date the warrant was signed.)

An affidavit must provide probable cause that the objects sought shall still be on the premises when the warrant is sought. (*Sgro v. United States* (1932) 287 U.S. 204 [77 L.Ed. 263, 53 S.Ct. 138].) The passage of six days in a vacuum is substantial because the informant's hearsay allegation that "Scott" was selling cocaine is of little, if any, value. Therefore, the question is whether the

presence of a "quantity of cocaine" on day 1 assumes its existence at the address six days later? The best answer that the police can get here is only "maybe" (certainly not a probable cause finding) because it is reasonable that the "quantity" may be small and, therefore, easily and quickly consumed.

While the possible staleness of the information, by itself, does not bring down this house of cards, it is one more factor to consider in evaluating the objective lack of probable cause for the issuance of the warrant.

F. The Warrant and Affidavit Were not Reviewed By a Prosecutor

The affidavit is clearly deficient in one final omission — that Officer Bixby did not seek the help of a deputy district attorney in preparing the warrant and affidavit. A review by a prosecutor is not a *sine qua non* for the issuance of a valid warrant. On the other hand, the absence of review raises questions as to Officer Bixby's motives for bypassing the District Attorney's office. Was he afraid, as an example, that a prosecutor would have required him to conduct an additional investigation to establish a totality of circumstances that sales of cocaine were taking place at apartment 139?

In this regard, the Appellant respectfully requests that this Court take judicial notice (Evidence Code § 452(g)) that Los Angeles County has hundreds of prosecutors; that the Culver City Police Department is located near both the Culver City and Santa Monica Courthouses which have a large number of prosecutors; that the Los Angeles County District Attorney's Office has deputies assigned on a daily basis to review and assist police officers in the preparation of search warrants and that *there is no showing that an emergency existed which justi-*

ed Officer Bixby's bypassing prosecution review and proceeding directly to a magistrate. With this perspective, it is not objectively reasonable for a police officer to take on the difficult task of writing a valid search warrant without the assistance of an experienced prosecutor.

VI.

OBJECTIVE BELIEF IN PROBABLE CAUSE TO SUPPORT THE SEARCH WARRANT IS UNREASONABLE

In summary, the affidavit is in the following poor condition:

(1) There was *no personal knowledge* for the informant's allegation that "Scott" was selling cocaine and that he lived at 2901 Sepulveda Boulevard, apartment 139, Los Angeles, California;

(2) The informant's observation of "a quantity of cocaine" is an *unsupported conclusion*;

(3) The informant provides *no detail* to give credence to his/her allegation that "Scott" was selling cocaine and that a "quantity of cocaine" was in apartment 139;

(4) The informant's prior information did not lead to case filings, held to answer decisions or convictions;

(5) The information as to possession of a quantity of cocaine is *stale*;

(6) *There are no "totality of circumstances"* to consider other than the informant's broad allegations; and

(7) *There is no independent police investigation* for the purposes of establishing the informant's veracity or shoring up the problems in numbers (1) through (4).

A review of these problems presents an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." (*United States v. Leon, supra*, 468 U.S. at p. 923, 82 L.Ed.2d at p. 699.) Therefore, the Appellant respectfully requests that this Court, on that basis, reverse the trial court's ruling at the suppression hearing and dismiss the judgment of conviction.

VII.

THE POLICE OFFICERS VIOLATED PENAL CODE § 1531[6]

Officer Bixby waited only 20 to 30 seconds after having identified himself, stated his purpose and demanded entry before breaking down the door. He justified this quick action and show of force solely on the fact that someone had looked out the back door after the first knock and that no one had opened up the door after the second demand. (R.T. 33:20-26.)

"20 seconds of silence may be sufficient in one case and insufficient in another." (*People v. Elder* (1976) 63 Cal.App.3d 731, 739.) In this case, the twenty to thirty second period is insufficient because Officer Bixby had no specific facts to believe that he was in danger or that evidence would be destroyed. The general propensity held by Officer Bixby that "it's very common for people to get rid of evidence, flush the narcotics down the toilet and/or arm themselves" (R.T. 33:20-26) was unestablished and, therefore, invalid in this instance. (Such a "belief must be

---

[6]"The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute the warrant, if, after notice of his authority and purpose, he is refused admittance."

based on specific facts and not on broad, unsupported presumptions." *People v. Dumas* (1973) 9 Cal.3d 871, 878-879.) All that the officer knew was that a man had looked out the back door in response to the first knock and that there were footsteps either going towards or away from the front door where the officer stood.

Furthermore, twenty to thirty seconds is not long in the scope of things when there are *six police officers outside with no specific knowledge that the situation is dangerous or that evidence might be destroyed.* There was no concrete reason to believe that the occupants were refusing the police officers' entry — especially with the *reasonable probability that an occupant was walking towards the door to open it — as, in fact, Mr. Corwin was doing.* (R.T. 48.)

In light of these minimal and harmless circumstances, the occupants of apartment 139 should have first been given an opportunity to voluntarily surrender the premises. (*People v. Neer* (1986) 177 Cal.App.3d 991, 995-996.) After all, "there were no specific facts, such as shouting or running, to support an objectively reasonable belief the occupants had refused entry." (*Id.,* at p. 996.)

Therefore, for the independent grounds that the police violated Penal Code § 1531, the Appellant respectfully requests that the evidence seized be excluded and that the case be dismissed.[7]

---

[7]After the enactment of California Constitution Article I, section 28, subdivision (d) by Proposition 8 in 1982, a court may still suppress evidence seized after a violation of § 1531. (*Id.,* at p. 997.)

CONCLUSION

For the reasons given above, the Appellant respectfully requests that this Court find that objective good faith does not support the existence of the search warrant, that Penal Code § 1531 was violated, that the fruits of the search should have been suppressed, that the trial court's decision is reversed and that the case is dismissed.

Dated: February 2, 1988

Respectfully submitted,

Law Offices of
RICHARD M. COLEMAN
A Professional Corporation

By: MICHAEL D. MARCUS

Attorneys for Defendant and Appellant Scott Jonathan Corwin

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On February 2, 1988, I served the within Appellant's Opening Brief in re: "People of the State of California vs. Scott Jonathan Corwin" in the Court of Appeal, Second Appellate District, State of California, 2nd Crim. No. B028330;

On the Parties in said action, by placing One copy thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Office of the District Attorney
210 West Temple Street, Room 1800
Los Angeles, California 90012

Office of the Attorney General
3580 Wilshire Boulevard
Los Angeles, California 90010

The Honorable Leslie W. Light
Los Angeles Superior Court
West District
1725 Main Street
Los Angeles, California 90401

California Supreme Court
3580 Wilshire Boulevard, Room 213
Los Angeles, California 90010 (7)

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on February 2, 1988, at Los Angeles, California

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APPENDIX B

2nd Crim. No. B028330

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION TWO

PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF AND RESPONDENT,

VS.

SCOTT JONATHAN CORWIN,
DEFENDANT AND APPELLANT.

Appeal from Superior Court of Los Angeles County
Honorable Leslie W. Light, Judge

APPELLANT'S PETITION FOR REHEARING

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Pursuant to California Rule of Court 27b, Defendant and Appellant petitions this Honorable Court for a rehearing of the above-entitled matter on the following grounds:

1. THE COURT'S OPINION, IN HOLDING THAT THE CORRECT OBJECTIVE TEST WAS USED, DOES NOT RECONCILE THE TRIAL COURT'S INCONSISTENT FINDINGS.

This Court's Opinion held that:

> "The trial court was aware of, and applied, the proper objective standard in assessing the reasonableness of the police officer's reliance upon a search warrant." (Opinion of the Court, pp. 5-6.)

This conclusion does not address the actual statements by the trial court (repeated below) which indicate that it relied upon a subjective rather than an objective standard in determining the issue of good faith:

> "... I don't see how you can possibly in the absence of actual bad faith by the officer indicate that a police officer would not be acting in good faith if he relied on a warrant issued on the basis of that affidavit."
>
> * * *
>
> "... I can hardly turn around and say that the police officer was not acting in good faith in believing and accepting the magistrate's determination that this affidavit was sufficient to the issue of this warrant." (R.T. 6-7.)

These two very glaring misstatements of the applicable law are inconsistent with this Court's finding that the trial court applied an objective standard.

2. THE COURT'S OPINION DID NOT DISCUSS THE FACTUAL ISSUES RAISED BY THE APPELLANT IN SUPPORT OF HIS ARGUMENT THAT THE SEARCH WARRANT AFFIDAVIT WAS SO LACKING IN INDICIA OF PROBABLE CAUSE AS TO RENDER OFFICIAL BELIEF IN ITS EXISTENCE ENTIRELY UNREASONABLE.

The Appellant raised numerous distinct issues in support of his argument that objective belief in the existence of probable cause to support the search warrant was unreasonable. These issues, in summary, are:

(a) There was no personal knowledge for the informant's allegation that "Scott" was selling cocaine and that he lived at a particular address;

(b) The informant's observation of a "quantity of cocaine" was an unsupported conclusion;

(c) The informant provided no detail to give credence to his/her allegations that "Scott" was selling cocaine and that a quantity of cocaine could be found in the particular apartment;

(d) The informant's prior information had not led to case filings, held to answer rulings or convictions;

(e) The information as to possession of a "quantity of cocaine" was stale;

(f) There was no indication as to whether other people were present when the alleged observation of "cocaine" was made;

(g) There were no "totality of circumstances" to consider in the affidavit other than the informant's broad allegations;

(h) The police officer did not conduct any independent police investigation for the purposes of establishing the informant's veracity;

(i) The informant's information was totally uncorroborated;

(j) The police officer did not contact the district attorneys for a review of the facially defective warrant prior to submitting it to a magistrate.

The finding by this Court that "The affidavit set forth information and observations provided to the officer by a confidential informant who had proved reliable in narcotics investigations in the recent past" (Opinion of the Court, p. 6) does not resolve any of the problems identified by the Appellant. Each of these factual issues must be analyzed if *United States v. Leon*'s holding that a search warrant may be suppressed where the "affidavit is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable",[1] is to be given its due. The Appellant respectfully submits that *Leon* requires a factual discussion of the warrant's problems. It is not enough for this Court to merely find in a footnote that "We believe the affidavit to be sufficient to support the search warrant." (Opinion of the Court, p. 6, fn.2.)

3. THE "TOTALITY OF CIRCUMSTANCES" WERE NOT EXAMINED

The *Leon* good faith rule also applies a "totality of circumstances" analysis to determine the existence of good faith. (*Id.*, at p. 915, 82 L.Ed.2d at p. 694.) Therefore, the "totality of circumstances" in the affidavit must be examined. This has not been done.

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[1]468 U.S. 897, 923 [82 L.Ed.2d 677, 699; 104 S.Ct. 3405].

4. THIS COURT DID NOT DISCUSS THE LACK OF AN INDEPENDENT POLICE INVESTIGATION

The failure by the police to conduct an independent investigation particularly undercuts any finding of good faith. (*Higgason v. Superior Court* (1985) 170 Cal.App.3d 929, 944; 216 Cal.Rptr. 817.) The Court's opinion does not reflect this problem either.

5. THE INFORMANT WAS NOT CREDIBLE

Application of *Aquilar-Spinelli* standards (see A.O.B., p. 11, fn. 4 for support of the proposition that this analysis is still legally appropriate) undercuts the informant's credibility because his/her providing of other information which has merely led to arrests and seizures of contraband is insufficient. Case law cited by the Appellant in his Opening Brief (A.O.B., pp. 14-15) firmly establishes the principle that such information must be supported by the independent approval of a prosecutor, magistrate or trier of fact. It is not enough, as this Court has held here, that the affiant "reasonably believed the informant knowledgeable as to the information provided." (Opinion of the Court, p. 6.)

6. WHAT ANOTHER TRIAL COURT WOULD HAVE DONE IS IRRELEVANT

This Court put substantial stock in the trial court's having observed that "a different judge might well have found sufficient probable cause in the affidavit submitted in support of the warrant." (Opinion of the Court, p. 6.) This observation was made, however, by Judge Light in discussing what another judge might have done in reviewing the motion to quash (which Judge Light granted) and

not the suppression of the evidence (which he subsequently denied).

> "But the test is not what I would have done. As the analysis of *Gates* indicated in quoting from a very old case of *Hock v. The United States*, an 1813 case, 11 U.S. 339. But I'm — and I can see where another superior court judge sitting in my place would say, 'Look at *Love* and this. It think it's enough under the totality of the circumstance of the cases, and I'm denying motion to quash.' But I don't think the affidavit is enough. The motion to quash is granted." (R.T., p. 4.)

Judge Light's observation, then, as to what another judge might have done is irrelevant to the issue of good faith since it was made in the context of an unrelated issue.

In any event, the Appellant respectfully submits that the issue of good faith should be evaluated not in terms of what another trial judge might have found as to probable cause but rather as to whether the affidavit in support of the warrant was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. That standard requires an examination of the applicable facts under an objective legal analysis and not a consideration of what one judge or one police officer might believe.

7. THIS COURT'S OPINION APPLIES A SUBJECTIVE STANDARD TO THE ANALYSIS OF GOOD FAITH

At the conclusion of the paragraph which analyzed the good faith issue, this Honorable Court concluded that:

> "This officer reasonably concluded that the warrant was valid." (Opinion of the Court, p. 6.)

This finding misapplies the *Leon* objective standard. The question is not what the police officer reasonably concluded but whether official belief in the existence of probable cause was entirely unreasonable. If a subjective standard were the test, there never could be a suppression of the fruits of a search warrant because it is doubtful that any police officer would testify under oath that he did not believe that the warrant was valid. The most deficient warrant could therefore always be saved.

8. HURRIED FOOTSTEPS AND A VIEW OF THE OCCUPANT DID NOT EXCUSE THE FORCEFUL ENTRY

The footsteps heard inside by the police officer may have been "hurried" (Opinion of the Court, p. 6) but they were possibly going to the door as well as away from it. (R.T. pp. 14 and 35.) In addition, Officer Bixby testified that "footsteps" and "hurried movement" meant the same thing to him. (R.T., p. 22.) Footsteps possibly going toward the door do not equate with a refusal to deny entry. There were, in other words, not enough facts to support an objectively reasonable belief that the occupants had refused entry. (*People v. Neer* (1986) 177 Cal.App.3d 991, 996.)

Forceable entry was not made, as the Court found, because the officer reasonably concluded that entry was being refused. (Opinion of the Court, p. 7.) There is no mention in Officer Bixby's testimony at the Penal Code

section 1538.5 hearing that that was the basis for his entry. Instead, he testified that he believed that people inside were destroying evidence and arming themselves. (R.T., pp. 14 and 25.) The officer based this opinion on a general propensity that it was "very common for people to get rid of evidence, flush the narcotics down the toilet and/or arm themselves." (R.T. 33:20-26.) Such a belief, by itself, is not enough to allow a nonconsensual entry. The opinion of destruction of evidence and fear for one's safety must be "based on specific facts and not on broad, unsupported presumptions". (*People v. Dumas* (1973) 9 Cal.3d 871, 878-879.) This Court, however, did not discuss this argument which was raised by the Appellant at pages 20 and 21 of his Opening Brief.

9. CONCLUSION

For the reasons given above, the Appellant respectfully requests that this Honorable Court rehear the appeal of the Defendant on the grounds raised in this petition.

DATED: June 16, 1988

Respectfully submitted,

LAW OFFICES OF
RICHARD M. COLEMAN
A Professional Corporation

By: MICHAEL D. MARCUS
Attorneys for Defendant and Appellant Scott J. Corwin

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.:

I, the undersigned, say: I am and was at all times herein mentioned a resident of the County of Los Angeles, over the age of eighteen years, and not a party to the within action or proceeding; that my business address is 1801 Avenue of the Stars, Suite 810, Los Angeles, California 90067; that on the 16th day of June, 1988, I served the within APPELLANT'S PETITION FOR REHEARING in Case No. 2nd Crim. B028330 on the interested parties in said action or proceeding by depositing a true copy thereof, enclosed in a sealed envelope with the postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

OFFICE OF THE DISTRICT ATTORNEY
210 W. Temple Street, Room 1800
Los Angeles, CA 90012

OFFICE OF THE ATTORNEY GENERAL
3580 Wilshire Boulevard
Los Angeles, CA 90010

THE HONORABLE LESLIE W. LIGHT
Los Angeles Superior Court
West District
1725 Main Street
Santa Monica, CA 90401

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 16th day of June, 1988, at Los Angeles, California.

_____

Terry Rice

APPENDIX C

2nd Crim. No.
B028330

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF AND RESPONDENT,
VS.
SCOTT JONATHAN CORWIN,
DEFENDANT AND APPELLANT.

FILED IN THE SUPREME COURT JULY 11, 1988.

PETITION FOR REVIEW OF DECISION OF THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION TWO

Appeal from Superior Court of Los Angeles County
Honorable Leslie W. Light, Judge.
2nd Crim. No. A090739

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TO THE HONORABLE CHIEF JUSTICE OF CALIFORNIA AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

Scott Jonathan Corwin, Defendant and Appellant, respectfully petitions for review following the affirmation of his judgment of conviction by the Court of Appeal, Second Appellate District, Division Two, on June 1, 1988 and the denial of his petition for rehearing on June 23, 1988.

ISSUES PRESENTED FOR REVIEW

1. WHEN DOES A SEARCH WARRANT AFFIDAVIT BECOME SO FACTUALLY DEFICIENT AS TO BRING IT WITHIN THE EXCEPTION OF *UNITED STATES v. LEON* (1984) 468 U.S. 97 [82 L.Ed.2d 677, 104 S.Ct. 3405] THAT THE GOOD FAITH RULE DOES NOT APPLY WHEN THE AFFIDAVIT IS "SO LACKING IN INDICIA OF PROBABLE CAUSE AS TO RENDER OFFICIAL BELIEF IN ITS EXISTENCE ENTIRELY UNREASONABLE"?

2. DOES THE *LEON* GOOD FAITH RULE REQUIRE SOME INDEPENDENT INVESTIGATION BY A POLICE OFFICER WHEN THE ONLY OTHER INFORMATION IS PROVIDED BY A CONFIDENTIAL INFORMANT?

A. ALTERNATIVELY, CAN OBJECTIVE GOOD FAITH EXIST WHEN THE POLICE HAVE NOT CONDUCTED AN INDEPENDENT INVESTIGATION TO CONFIRM INFORMATION PROVIDED BY A CONFIDENTIAL INFORMANT?

3. CAN AN AFFIANT HAVE AN OBJECTIVE GOOD FAITH BELIEF IN THE EXISTENCE OF PROBABLE CAUSE MERELY BECAUSE A MAGISTRATE HAS SIGNED THE SEARCH WARRANT?

4. DO *AGUILAR-SPINELLI*[1] GUIDELINES STILL APPLY TO DETERMINING THE CREDIBILITY AND RELIABILITY OF AN INFORMANT WHEN THERE ARE NO SUPPORTING TOTALITY OF THE CIRCUMSTANCES AND THERE HAS BEEN NO INDEPENDENT INVESTIGATION BY THE POLICE EITHER OF THE INFORMANT'S STATEMENTS OR OF THE SUSPECT'S ALLEGED CRIMINAL CONDUCT?

5. CAN AN INFORMANT BE RELIABLE WHEN INFORMATION WHICH HE HAS PROVIDED IN THE PAST HAS NOT RESULTED IN CASE FILINGS, HELD TO ANSWER DECISIONS BY A MAGISTRATE OR CONVICTIONS?

6. TO WHAT EXTENT MUST A REVIEWING COURT EXAMINE THE ACTUAL CONTENTS OF THE SEARCH WARRANT AND SUPPORTING AFFIDAVIT IN DETERMINING THE EXISTENCE OR NON-EXISTENCE OF OBJECTIVE GOOD FAITH?

I.

STATEMENT OF THE CASE

A. Need for Review

In *United States v. Leon* (1984) 468 U.S. 897, 922-923 [82 L.Ed.2d 677, 698-699; 104 S.Ct. 3405], the Court appended substantial exceptions to the conclusion "that the marginal or non-existent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot

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[1]*Aguilar v. Texas* (1964) 378 U.S. 108 [12 L.Ed.2d 723, 84 S.Ct. 1509]; *Spinelli v. United States* (1969) 393 U.S. 410 [21 L.Ed.2d 637, 89 S.Ct. 584].

justify the substantial costs of exclusion." One exception was that "an officer (could not) manifest objective good faith in relying on a warrant based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable' ".

Since *Leon,* however, neither the United States Supreme Court, the Ninth Circuit Court of Appeals nor the California Supreme Court and Appellate Courts of this State have provided a bright line as to when an affidavit becomes so lacking in indicia of probable cause as to render objective good faith in its existence entirely unreasonable. The result is that police officers, prosecutors, defense counsel and the courts are not sure when the exception applies. The benefits of such a bright line ruling would improve the quality of search warrants and provide a guideline for judges when applying the good faith rule.

The "bare bones" search warrant in this case provides this Court with an excellent opportunity to define the outer limits of the good faith exception because the supporting affidavit is based only upon ambiguous and conclusionary statements by a confidential informant with no independent investigation having been conducted by the police agency.

A second important question of law presented by this petition which deserves to be settled is whether a police officer is entitled to rely on the judgment of a magistrate in signing a search warrant. The Appellant thinks not. While society has a substantial interest in protecting the innocent and punishing wrongdoers, it should not do so to the exclusion of the Fourth Amendment. A police officer's actions should not be immunized by the erroneous search warrant decision of a magistrate if objective good faith in the facts was not reasonable. Otherwise, the most deficient search warrant could be used to invade a person's privacy.

This case also presents this Court with an opportunity to decide if *Aguilar-Spinelli* guidelines for the determination of an informant's credibility and reliability are still applicable if the *Illinois v. Gates* (1983) 462 U.S. 213 [76 L.Ed.2d 527, 103 S.Ct. 2317] "totality of the circumstances" analysis cannot be applied because of the failure of the police to conduct any independent investigation in support of the informant's allegations. A resolution of this issue would benefit law enforcement in those situations where time constraints prevent it from actively investigating the informant's claims.

In summary, then, the facts of this case present a classic opportunity for this Court to present a primer to police officers, prosecutors, defense lawyers and judges on the basic and fundamental requirements for a search warrant affidavit in light of the *Gates* and *Leon* decisions.

B. Factual Statement of the Case

On November 23, 1984, Officer Scott Bixby of the Culver City Police Department executed a search warrant at 2901 Sepulveda Avenue, apartment 139, in the City and County of Los Angeles which resulted in the seizure of approximately five and one-third grams of cocaine. That warrant authorized Officer Bixby to search apartment 139 for, *inter alia,* cocaine and paraphernalia associated with the storage and use of cocaine.

The statement of probable cause in support of the search warrant affidavit is two and one-half pages in length. (Appendix A.) Only eight lines, however, are devoted to the factual basis for the affidavit. They consist of very general information provided by a confidential informant who told Officer Bixby:

> "[T]hat a male white known to the CRI only as "SCOTT", is selling one gram quantities of cocaine from his residence located at 2901 Sepulveda

> Boulevard, #139, Los Angeles, California. The CRI stated that the residence is on the west side of Sepulveda Blvd. north of National Blvd. The CRI stated that he/she had seen a quantity of cocaine contained within a clear plastic baggie inside the residence inside the residence [sic] on at least one occasion within three days prior to your affiant receiving this information from the CRI. The CRI described "SCOTT" as a male, white, 5-8, 135 lbs., short dark brown hair, brown eyes, and is approximately 25 year of age." (Affidavit, page A-4, lines 3-11.)

Officer Bixby formed the opinion in the affidavit that the informant was knowledgeable as to what cocaine looks like and the manner in which it is packaged and that the informant was also a cocaine user. He further stated that the informant had, within the past month, given him information on three prior occasions which had led to the arrest of three narcotic dealers and the seizure of "substantial amounts of narcotics." (Affidavit, page A-4, lines 13-21.) Officer Bixby provided no other information to support the informant's statement. Neither he nor any other police officer conducted an independent investigation of the informant's story.

C. Legal Proceedings

The District Attorney of Los Angeles County charged Mr. Corwin with a violation of Health and Safety Code section 11351, possession for sale of the five and one-third grams of cocaine.

Mr. Corwin moved to quash the warrant and the results of its execution on the basis that it had been issued without a sufficient showing of probable cause, the supporting information was "stale", the search warrant could not be saved by the "good faith" test and that police had

violated Penal Code section 1531 in their entry of the apartment.

Judge Leslie Light, the trial judge, held that he would not have signed the warrant because it was deficient as to whether or not the informant was speaking from personal knowledge. (R.T. 3-4.) He stated that he would have questioned the affiant as to what he knew about the source of the informant's story that "SCOTT" was selling cocaine. Judge Light then granted the Appellant's motion to quash the warrant. (R.T. 4.)

Judge Light next discussed the application of the *United States v. Leon, supra,* "good faith test" to the search warrant. Although he had substantial doubts about the officer's performance[2], he still held that the police officer had been acting in good faith in accepting the Magistrate's determination that the affidavit was sufficient to the issuance of the warrant. (R.T. 6-7.)

Mr. Corwin then withdrew his plea of not guilty and pled nolo contendere to the charge. He was granted probation for the offense on May 22, 1987. Mr. Corwin appealed to the Court of Appeal, Second Appellate District from that judgment of conviction and from the denial of his motion to suppress the results of the search warrant. The Court of Appeal denied Mr. Corwin's appeal in a non-published opinion on June 1, 1988. (Appendix B.) Mr. Corwin's peition for rehearing was denied by the Court on June 23, 1988. (Appendix C.)

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[2]"There is a lot about this case that isn't right. There is a lot about the officer's performance that is hardly in the textbook for police activity." (R.T. 86.)

II.

REASONS FOR GRANTING REVIEW

A. It is not Reasonable to Rely on the Alleged Probable Cause in the Instant Affidavit

The core of the two and a half page affidavit in support of the search warrant is found in the eight lines which set forth totally uncorroborated information by an informant which is so lacking in detail that it cannot establish probable cause. "It is a long established rule that a search warrant affidavit containing only the opinions and conclusions of the affiant, without disclosure of the underlying facts, will not constitute 'probable cause supported by oath or affirmation' as required by the Fourth Amendment of the United States Constitution. (*People v. Smith* (1986) 180 Cal.App.3d 72, 86, 225 Cal.Rptr. 348.) The remainder of the affidavit refers to Officer Bixby's prior training as a police officer, his opinion that the informant knows both what cocaine looks like and is familiar with the manner in which it is packaged, that the informant is a cocaine user and the fact that the informant had provided information on three prior occasions which had resulted in the seizure of narcotics and the arrest of three narcotic dealers.

An informant may neither be reliable nor credible yet the "totality of the circumstances" in the warrant may be sufficient to establish probable cause for the issuance of the warrant. That was the situation in *Illinois v. Gates* (1983) 462 U.S. 213, 76 L.Ed.2d 527, 103 S.Ct. 2317 and it was, likewise, the situation in *Massachusetts v. Upton* (1984) 466 U.S. 727, 80 L.Ed.2d 721, 104 S.Ct. 2085.

In *Upton,* an initially anonymous informant who was identified by the affiant in the search warrant gave detailed information as to the existence and location of stolen property. The affiant followed up that phone call by

corroborating the existence of some facts related by the informant and attaching confirming police reports of prior burglaries along with a list of the stolen property. The Court applied the totality of circumstances test and found probable cause for the issuance of the warrant although

> "[n]o single piece of evidence in it is conclusive. But the pieces fit neatly together and, so viewed, support the Magistrate's determination that there was 'fair probability that contraband or evidence of a crime would be found in Upton's motor home.' (Citation.) The informant claimed to have seen the stolen goods and gave a description of them which tallied with the items taken in recent burglaries. She knew of the raid on the motel room — which produced evidence connected to those burglaries — and that the room had been reserved by Kelleher. She explained the connection between Kelleher's motel room and the stolen goods at Upton's motor home. And she provided a motive both for her attempt at anonymity — fear of Upton's retaliation — and for furnishing the information — her recent breakup with Upton and her desire 'to burn him'." (466 U.S. at pp. 727-733-734; 80 L.Ed.2d at pp. 721-727-728; emphasis included.)

Therefore,

> "[t]he informant's story and the surrounding facts possessed an internal coherence that gave weight to the whole." (466 U.S. at p. 734; 80 L.Ed.2d at p. 728; emphasis included.)

The instant affidavit deserves no comparable interpretation. The pieces do not fit neatly together. There are no surrounding facts to provide an internal coherence that gives weight to the whole. There are no totality of circum-

stances by which to judge the quality and breadth of the probable cause. Everything rises and falls upon the informant's uncorroborated broad allegation, a story which the trial court judge had seriously questioned and found wanting.

B. For the *Leon* Good Faith Rule to be Operative, the Police Must Conduct an Independent Investigation When the Only Other Information is Provided by a Confidential Informant

Doubts as to the Informant's basis of knowledge, reliability and credibility are substantial. They may be resolved, however, if there has been corroboration by some independent police investigation. Without it, there are no totality of the circumstances to evaluate the informant's credibility and reliability.

> "Our decisions applying the totality of the circumstances analysis . . . have consistently recognized the value of corroboration of details of an informant's tip by independent police work. In *Jones v. United States* 362 U.S. at p. 269, 4 L.Ed.2d 697, 80 S.Ct. 725, 78 A.L.R.2d 233, we held that an affidavit relying on hearsay 'is not to be deemed insufficient on that score, so long as a substantial basis for crediting the hearsay is presented.' We went on to say that even in making a warrantless arrest an officer 'may rely upon information received through an informant, rather than upon his direct observations, so long as the informant's statement is reasonably corroborated by other matters within the officer's knowledge.' (Citation.) Likewise, we recognized the probative value of corroborative efforts of police officials in *Aguilar* - the source of the 'two-pronged test' by observing that if the police had made some effort to corroborate the informant's report at issue, 'an entirely different case would have been presented.' (Citation.)" (*Illinois v.*

Gates, supra, 462 U.S. at pp. 241-242 [76 L.Ed.2d at p. 550; 103 S.Ct. at p. 2334].)

For the above reasons, application of the good faith exception customarily requires presentation of facts about the manner in which the officers pursued their investigation. (*Higgason v. Superior Court* (1985) 170 Cal.App.3d 929, 944.) There is, however, in this instance no investigation to analyze. For this reason, alone, the good faith exception does not apply. Officer Bixby did not attempt to corroborate in any way the information provided by the informant. He did not conduct a utility check of apartment 139 to learn the identity of the subscriber of services. That information would not only have told him whether or not a person by the name of "SCOTT" was living in apartment 139 but also would have given him a name which he could have run through police records to see if that person had a prior arrest record. Officer Bixby did not conduct a surveillance of the apartment to see whether or not there was substantial foot traffic which would corroborate the informant's allegation that sales of cocaine were taking place at that location. Officer Bixby did not attempt to stop or detain any persons leaving apartment 139 to see whether or not they were in possession of contraband. Officer Bixby did not attempt to have the informant make a controlled buy or, alternatively, introduce undercover police officers for the purpose of making a buy.

C. *Aguilar-Spinelli* Guidelines Must be Used to Determine the Credibility and Reliability of an Informant When There are No Supporting Totality of Circumstances to Evaluate the Credibility of the Informant

Since there are no totality of the circumstances to evaluate the informant's story, it is necessary to judge the issue of the affidavit's probable cause by the existence or

non-existence of the informant's veracity, reliability and basis of knowledge.

Illinois v. Gates, supra, abrogated the two-pronged *Aguilar-Spinelli* test for the purposes of evaluating the credibility of informants and imposed, instead, a totality of the circumstances standard. The same standard is to be used to determine the existence of good faith as an exception to a faulty warrant. (*United States v. Leon, supra,* 468 U.S. at p. 915, 82 L.Ed.2d at p. 694.) Although the "totality of the circumstances" no longer includes the "two-pronged test", an informant's veracity, reliability and basis of knowledge are still highly relevant factors in determining the value of his report. (*Illinois v. Gates, supra* 463 U.S. at p. 230, 76 L.Ed.2d at p. 543.) These factors "should be understood simply as closely intertwined issues that may usefully eliminate the common sense, practical question whether there is 'probable cause' to believe the contraband or evidence is located in a particular case." (*Id.* at p. 230 and at p. 543.) Therefore, the two-pronged test is still relevant in the determination of probable cause. (*United States v. Estrada* (9th Circ. 1984) 733 F.2d 683, 685.)

Appellant is not suggesting that a search warrant, to be lawful, must always be supported by an independent police investigation. Under certain circumstances, even without an investigation, an informant can be reliable or credible. (Those circumstances do not exist here.) The *Gates* rule, however, does not provide for such an analysis. This appeal, therefore, presents this Court with an opportunity to hold that *Aquilar-Spinelli* standards may still be referred to in the absence of any totality of the circumstances.

D. Prior Information by an Informant, to be Sufficient for Establishing his Reliability, Must have Led to Case Filings, Held To Answer Decisions by Magistrates or Convictions

The Appellate Court erroneously held that the informant was "reliable" because he/she had provided information in the past month which had led to the seizures of substantial amounts of narcotics and the arrest of three narcotics dealers.[3] This ruling is inconsistent with decisions of this Court that such information, to be sufficient, must have led to case filings, held to answer rulings by a magistrate or convictions.

"In order to establish the reliability of an informant, it is not necessary to relate that his prior information led to convictions. It is sufficient that the prior information was accurate or was 'of such substance as to cause a reasonable person to conlcude that it is reliable.' " . . . (Therefore), "information from an informant who had twice previously provided police with tips that had led to arrests and trial was sufficiently reliable to establish probable cause for an arrest. Prior information that had proved accurate in leading to two valid arrests was also held to be sufficient to establish reliability in *People v. Richardson* (1970) 6 Cal.App.3d 70 [85 Cal. Rptr. 607]." (*People v. Durham* (1973) 9 Cal.3d 871, 876.)

In *People v. Superior Court (Johnson)* (1972) 6 Cal.3d 704, a factually detailed affidavit included a representation that an informant had provided information in the past which had led to an arrest but that no one had yet been held to answer or convicted, as a result, because neither the preliminary hearing or trial had yet been held.

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[3]"The affidavit set forth information and observations provided to the officer who had proved reliable in narcotics investigations in the recent past." (Appendix B, p. 6.)

Although this information from the informant "was not so strong a showing as would be the case where the person arrested has been held to answer or convicted, the affidavit contained an explanation that no preliminary hearing or trial had taken place; and the fact that the arrest was made and the charges had not been dismissed would constitute some substantiation of the informant's reliability." (*Id.* at p. 714.)

The need, then, for a criminal filing, or, even better, a held to answer decision by a magistrate or conviction is necessary and reasonable because otherwise no independent, reasonable person has reviewed the informant's story and found it to be accurate or reliable. In the absence of such third party analysis, the police officer decides whether or not the informant was credible and reliable. Whether or not the prior information was accurate becomes irrelevant. Whether or not those arrests and seizures were supported by probable cause is not to be considered. This Court, however, saw the error of such a course and required some independent validation for prior arrests or seizures rather than rely on the police officer's self-fulfilling prophecy that the informant was reliable.

It is probable that Officer Bixby realized that he could not, for Fourth Amendment reasons, bring these other arrests to a prosecutor's attention or, alternatively, that the applicable prosecuting agency declined prosecution because of search and seizure problems or failure of proof. Either situation would adversely reflect upon the credibility of the informant.

E. An Objective Good Faith Belief on the Part of the Police Officer is not Established Merely Because A Magistrate Has Signed the Search Warrant and Supporting Affidavit

Since the *Leon* decision, prosecutors have argued at trial level suppression hearings that objective good faith is established when a magistrate has signed a search warrant because the officer should be allowed to rely upon the intervening and independent analysis of a judge as to the existence of probable cause.

This proposition is legally incorrect. In *Malley v. Briggs* (1986) 475 U.S. 335, 345-346 [89 L.Ed.2d 271, 281, 106 S.Ct. 1092], the Court rejected the argument that the petitioning police officer was entitled to rely on the judgment of a judicial law officer in issuing the warrant.

> "This view of objective reasonableness is at odds with our development of that concept in *Harlow* and *Leon*. In *Leon*, we stated that 'our good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization.' (Citation omitted.) The analogous question in this case is whether a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant. (fn. omitted.) If such was the case, the officer's application for a warrant was not objectively reasonable, because it created the unnecessary danger of an unlawful arrest. It is true that in an ideal system an unreasonable request for a warrant would be harmless, because no judge would approve it. But ours is not an ideal system, and it is possible that a magistrate, working under docket pressures, will fail to perform as a magistrate should. We find it

> reasonable to require the officer applying for the warrant to minimize this danger by exercising reasonable professional judgment.[9]

The *Malley* holding is sound from a policy point of view because it would be too easy, otherwise, for prosecutors to insulate the good faith rule from critical analysis by merely arguing that the officer was entitled to rely upon the magistrate's having signed the warrant.

Mr. Corwin respectfully requests that this Court clearly state that the mere signing of a search warrant by a magistrate does not establish the existence of objective good faith. Such a ruling would deflate the argument made to frequently in the trial courts that the magistrate's signature negates any further need to determine whether the affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.

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[9] "Notwithstanding petitioner's protestations, the rule we adopt in no way 'requires the police officer to assume a role even more skilled . . . than the magistrate.' (Petitioner's brief reference omitted.) It is a sound presumption that 'the magistrate is more qualified than the police officer to make a probable cause determination', ibid, and it goes without saying where a magistrate acts mistakenly in issuing a warrant but within the range of professional competence of a magistrate, the officer who requested the warrant cannot be held liable. But it is different if no officer of reasonable competence would have requested the warrant, i.e., his request is outside the range of the professional competence expected of an officer. If the magistrate issues the warrant is such a case, his action is not just a reasonable mistake, but an unacceptable error indicating gross incompetence or neglect of duty. The officer then cannot excuse his own default by pointing to the greater incompetence of the magistrate."

F. To Determine the Existence or Non-Existence of Objective Good Faith, A Reviewing Court Must Examine the Supporting Facts in the Affidavit

The Appellant pointed out in detail to the Appellate Court that objective belief in the existence of probable cause to support the search warrant was unreasonable because:

(1) There was no personal knowledge for the informant's allegation that "Scott" was selling cocaine and that he lived at 2901 Sepulveda Boulvard, apartment 139, Los Angeles, California;

(2) The Informant's observation of "a quantity of cocaine" was an unsupported conclusion;

(3) The informant provided no detail to give credence to his/her allegation that "Scott" was selling cocaine and that "a quantity of cocaine" was in apartment 139;

(4) The informant's prior information had not led to case filings, held to answer decisions or convictions;

(5) The information as to possession of a quantity of cocaine was stale;

(6) There were no "totality of circumstances" to consider other than the informant's broad allegations; and

(7) There was no independent police investigation for the purposes of establishing the informant's veracity or shoring up the problems in numbers (1) through (4).

Nonetheless, the Appellate Court failed to discuss any of the items before concluding that the "officer reasonably

believed the informant knowledgeable as to the information provided."[4] (Appendix B, p. 6.)

The Appellant respectfully believes that the Appellate Court would have found otherwise had it analyzed the deficiencies identified above. He respectfully observes that good faith cannot be discussed in a vacuum as was done here; it requires a review of the contents of the search warrant and supporting affidavit.

III.

CONCLUSION

For all the reasons stated, Scott Corwin petitions this Court for review of the Court of Appeal's affirmation of his judgment of conviction.

DATED: July 8, 1988

Respectfully submitted,

COLEMAN & MARCUS
A Professional Corporation

By: _____
MICHAEL D. MARCUS
Attorneys for Defendant and Appellant Scott Jonathan Corwin

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[4]The Appellate Court appears to have applied a subjective rather than an objective analysis in finding good faith. This potential error was referred to in the Appellant's petition for rehearing.

APPENDIX A

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES
AFFIDAVIT FOR SEARCH WARRANT

Officer R. S. Bixby, #401, being sworn, says that on the basis of the information contained within this affidavit, he has probable cause to believe and does believe that the property described below is seizable pursuant to Penal Code Section 1524 in that it: (CHECK APPROPRIATE BOX OR BOXES)

_____ was stolen or embezzled

XXX was used as the means of committing a felony

XXX is possessed by a person with the intent to use it as a means of committing a public offense or is possessed by another to whom he may have delivered it for the purpose of concealing it or preventing its discovery

XXX is evidence which tends to show that a felony has been committed or a particular person has committed a felony;

and that he has probable cause to believe and does believe that the described property is now located at and will be found at the locations set forth below and thus requests the issuance of a WARRANT TO SEARCH the premises located at 2901 Sepulveda Blvd., Los Angeles, California, Apartment #139, further described as a beige, three-story apartment building with a stucco finish, the number 2901 is in white numbers on the front of the building. Apartment #139 is on the first floor, has a brown exterior door that has the number 139 on the outside.

* * *

for the following property; cocaine and paraphernalia associated with the storage and use of cocaine, and

consisting in part of and including, but not limited to, coke spoons, baggies, snorting devices, mirrors, razor blades, sifters, hypodermic needles, and syringes, paper bindles, milk sugars, and other substances used as "cut", scales, and other weighing devices, and items used in the "free-basing process of cocaine, and storage containers commonly used and associated with the storage of the above paraphernalia and/or cocaine. Articles of personal property tending to establish identification of persons in control of the premises, vehicles, and storage areas or containers where utility receipts are located, including but not limited to, letters, keys, and utility receipts, and all garages, and outbuildings attached to the residence described on page A-1 of the affidavit. And all incoming telephone calls, during the service of the search warrant; searching officers request authorization to answer the phone and converse with callers who appear to be calling in regard to drug sales and note and listen to the conversation without revealing their true identity.

Your affiant says that the facts in support of the issuance of the search warrant are contained in the attached STATEMENT OF PROBABLE CAUSE which is incorporated as if fully set forth herein. Wherefore, your affiant prays that a search warrant be issued for the seizure of said property or any part thereof, at any time of the day OR NIGHT*, good cause therefore having been shown.

R.S. BIXBY
Signature of Affiant

Subscribed and sworn to before me
this 23rd day of November, 1984

FRANK W. TROOST
Signature of Magistrate

Judge of the _____ Court CULVER
Superior/Municipal Judicial District

Prepared with assistance of, or reviewed by

_____
Deputy District Attorney

* Strike OR NIGHT if not applicable.

Your affiant, Officer Scott Bixby # 401, is employed by the Culver City Police Department and is currently assigned to the Selective Enforcement Section/Narcotics Detail.

Your affiant has been a Police Officer since May, 1980 and during that time has received extensive training in the areas of identification, appearances, effects and packaging of narcotics and dangerous drugs and in addition, has received training in the manners in which the sales of dangerous drugs and narcotics are conducted.

Prior to your affiant's assignment to the Selective Enforcement Section, your affiant participated in more than one hundred narcotics related arrests for narcotics and dangerous drugs. Your affiant has personally made in excess of one hundred arrests for narcotics and dangerous drugs possession, possession for sale and other related offenses.

Your affiant's training includes (1) twenty hours of classroom instruction in the recognition, use, packaging and sales of dangerous drugs and narcotics at the Rio Hondo Police Academy, (2) twenty-four hours of classroom instruction conducted by the California Department of Justice on Opiate Influence Training, (3) forty hours of classroom instruction on Basic Narcotics Investigation conducted by the Los Angeles County Sheriff's Department, (4) individual training received while working with Special Agents of the Bureau of Narcotic Enforcement and other experienced Culver City Police Department Narcotic Enforcement Officers. Your affiant is thoroughly familiar with the methods and use of narcotics and dangerous drugs in Los Angeles County.

Within the past 72 hours your affiant received information from a confidential reliable informant hereinafter refered to as the *CRI.* The CRI told your affiant that a

male white known to the CRI only as *"SCOTT" is selling one gram quantities of cocaine from his residence* located at 2901 Sepulveda Blvd. # 139, Los Angeles, California. The CRI stated that the residence is on the west side of Sepulveda Blvd. north of National Blvd. The CRI stated that he/she *had seen a quantity of cocaine contained within a clear plastic baggie inside the residence inside the residence on at least one occasion within three days prior to your affiant receiving this information from the CRI.* The CRI described "SCOTT" as a male, white, 5-8, 135 lbs., short dark brown hair, brown eyes, and is approximately 25 years of age.

Your affiant has carefully examined and questioned the CRI regarding the appearance, packaging, price and use of cocaine and has formed the opinion that the CRI knows what cocaine looks like and the manner in which it is packaged. It is also your affiants opinion, based upon an examination of the CRI, that he/she is also a cocaine user. Your affiant believes the CRI to be a reliable informant for the following reasons: Within the past month your affiant received information from this informant on three prior occasions which resulted in the seizure of substantial amounts of narcotics and the arrest of three narcotic dealers. Your affiant has never received false or misleading information from the CRI.

Your affiant requests that the identity of the CRI remain confidential for the following reasons: Disclosure of the informant's identity would endanger the safety and well being of the informant, and disclosure would destroy the CRI's future usefulness to law enforcement in detecting criminal activity.

Your affiant drove by 2901 Sepulveda Blvd. # 139, Los Angeles, California and observed this location to be as described in page A-1 of this affidavit.

From the information contained in this affidavit, your affiant has formed the expert opinion that cocaine is *presently* located at 2901 Sepulveda Blvd. # 139, Los Angeles, California, *since persons who sell cocaine ordinarily keep quantities of cocaine within their residence for the purpose of immediate sale.* Your affiant also states that the narcotics paraphernalia enumerated on page A-2 of this affidavit are articles that are commonly found in and associated with places where cocaine is found to be present.

APPENDIX B

Michael Marcus
1801 Avenue of the Stars
Suite 810
Los Angeles, CA 90067

B028330

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

No. B028330
(Super.Ct.No. A090739)

THE PEOPLE,
PLAINTIFF AND RESPONDENT,
v.
SCOTT JONATHAN CORWIN,
DEFENDANT AND APPELLANT.

Filed in Supreme Court

Scott Jonathan Corwin appeals from the judgment (order granting probation) entered upon his plea of no contest to possession for sale of cocaine (Health & Saf. Code, § 11351), following denial of his motion to suppress evidence (Pen. Code, § 1538.5). He contends: "[I.] The trial court erroneously applied a subjective good faith standard in evaluating the search warrant. [II.] The affidavit in support of the warrant was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. [III.] Objective belief in probable cause to support the search warrant is unreasonable. [IV.] The police officers violated Penal Code § 1531."

Viewing the evidence in accordance with the appropriate standard of review of an order denying a motion to suppress evidence (*People* v. *Leyba* (1981) 29 Cal.3d 591, 596-597; *People* v. *Hobbs* (1987) 192 Cal.App.3d 959, 961-962), it was established that on November 23, 1984,

Culver City Police Officer Scott Bixby obtained a warrant authorizing search of apartment 139 at 2901 Sepulveda Boulevard in Los Angeles for cocaine. In the affidavit in support of the warrant, he stated that, within the preceding three days, a confidential reliable informant told him that "Scott" was selling one-gram quantities of cocaine from Scott's residence at the above address. The informant stated he or she had seen a quantity of cocaine in a clear plastic baggie inside the residence within three days prior to the time of supplying the information to the officer, and also provided Scott's description.

Bixby questioned the informant about the appearance, packaging, price and use of cocaine and formed the opinion that the informant was knowledgeable about cocaine and had used it. Bixby believed the informant was reliable because the informant had provided information on three occasions within the previous month which resulted in the seizure of substantial amounts of drugs and the arrest of three dealers. The informant had never given the officer false or misleading information. The officer drove by the apartment and found it to be as the informant described. Bixby, an experienced narcotics officer, concluded that cocaine was presently located at the apartment because persons who sell cocaine customarily keep quantities of the substance in their residences for immediate sale.

The trial court granted appellant's motion to quash the search warrant, finding the affidavit lacked sufficient probable cause because it was not clear that the informant had personal knowledge that Scott sold cocaine. The court observed, however, that another superior court judge might "think it's enough under the totality of the circumstances. . . ." and might deny the motion to quash.

In ruling on the issue of whether the officer relied in good faith on the warrant, the court criticized a recent

case cited by the parties because "it seems to be going on the concept that the particular officer in question is shown to have subjectively had good faith as opposed to the language in Leon [*United States* v. *Leon* (1984) 468 U.S. 897] that seems to require an objective good faith. Not a question of whether this particular officer in good faith believed, I don't think that's required." The court then remarked, with regard to another case, "I find the language in that opinion to pretty well express my feelings about this situation. That is I've got a case here where I can see different judges having different opinions than I do on the question of whether Gates [*Illinois* v. *Gates* (1983) 462 U.S. 213] applies to this affidavit. [¶] And if that's true, I don't see how you can possibly in the absence of actual bad faith by the officer indicate that a police officer would not be acting in good faith if he relied on a warrant issued on the basis of that affidavit. [¶] .... I'm not willing to find in my eyes that [the information provided in the affidavit] is sufficient [under] Gates. But I think it's so close that I can hardly turn around and say that the police officer was not acting in good faith in believing and accepting the magistrate's determination that this affidavit was sufficient to the issuance of this warrant." The court found that Officer Bixby relied upon the warrant in good faith.

Other evidence introduced at the hearing established that Officer Bixby and five other officers served the search warrant at appellant's residence during the late afternoon of November 23, 1984. Officers Scheu and Holloway went to the rear sliding glass door while Officer Bixby knocked on the front door. A male inside the apartment asked, "Who is it?" Bixby loudly replied, "Police officers with a search warrant. Open the door." As Bixby heard the inquiry from inside, Officer Scheu radioed to him that someone matching appellant's description had just looked out the back sliding glass door and shut it. Bixby again

knocked on the front door and announced loudly, "Police officers with a search warrant. Open the door."

Bixby heard the sounds of people "moving around inside in a hurried[ ] fashion." Based upon prior experience, the officer concluded that individuals inside the apartment were destroying evidence or arming themselves and ordered one of the other officers to force open the door. Twenty to thirty seconds elapsed between the first announcement of identity and purpose and the forcing of the door.[1]

The trial court denied the motion, observing, "[U]nder the circumstances of two knocks and two announcements and twenty seconds, as followed by sounds inside and obvious response, that the people knew that officers were out there; that if I were an officer standing at that door under those circumstances, knowing what happens in this community in many instances involving drug seizures, twenty seconds is a lifetime. [¶] You don't have to wait to hear a bolt being slid and you don't have to wait to hear a toilet being flushed."

Appellant's contentions regarding the trial court's finding that the officer relied in good faith upon the warrant are without merit. The trial court was aware of, and applied, the proper objective standard in assessing the reasonableness of the police officer's reliance upon a search warrant. (*People* v. *MacAvoy* (1984) 162 Cal.App.3d 746, 761, 763.) The affidavit set forth information and observations provided to the officer by a confidential informant who had proved reliable in narcotics investigations in the recent past. The officer reasonably believed the informant knowledgeable as to the informa-

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[1]Appellant claimed that he responded "Who is it?" after each of the two knocks, but received no answer. Ten seconds after he heard the first knock, several officers forced entry.

tion provided. As the trial court observed, a different judge might well have found sufficient probable cause in the affidavit submitted in support of the warrant.[2] The officer reasonably concluded that the warrant was valid. (*United States* v. *Leon* (1984) 468 U.S. 897, 923, 926; see *People* v. *Lopez* (1986) 181 Cal.App.3d 842, 845-846.)

The contention that the officers failed to adequately await a response before forcing entry is meritless. An officer may force entry to serve a warrant if he is refused admittance after announcing his identity and purpose. During the 20 to 30 seconds between the officer's first announcement and the forced entry, the observation of someone resembling the description of appellant and the sound of hurried movements revealed that someone was inside the apartment. (Cf. *Jeter* v. *Superior Court* (1983) 138 Cal.App.3d 934, 937.) After the knock and request for entry were repeated in vain, the officer reasonably concluded that entry was being refused. Under these circumstances, forcible entry to execute the search warrant was lawful. (Cf. *People* v. *Gallo* (1981) 127 Cal.App.3d 828,

[2]We believe the affidavit to be sufficient to support the search warrant.

838-839; *People* v. *McCarter* (1981) 117 Cal.App.3d 894, 906; *People* v. *Elder* (1976) 63 Cal.App.3d 731, 739.)

The judgment (order granting probation) is affirmed.

NOT TO BE PUBLISHED.

FUKUTO, J.

FUKUTO

We concur:

ROTH, P.J.

ROTH

COMPTON, J.

COMPTON

APPENDIX C

COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
Robert N. Wilson, Clerk

Division: 2 Date: 06/23/88

Michael Marcus
1801 Avenue of the Stars
Suite 810
Los Angeles, CA 90067

Re: People
vs.
Corwin, Scott
2 M B028330
Los Angeles, No. A090739

THE COURT:
Petition for rehearing denied.

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } SS:

I, the undersigned, say: I am and was at all times herein mentioned a resident of the County of Los Angeles, over the age of eighteen years, and not a party to the within action or proceeding; that my business address is 1801 Avenue of the Stars, Suite 810, Los Angeles, California 90067; that on the 11th day of July, 1988, I served the within APPELLANT'S PETITION FOR REVIEW OF DECISION OF THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION TWO, in Case No. 2nd Crim. B028330 on the interested parties in said action or proceeding by depositing a true copy thereof, enclosed in a sealed envelope with the postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

OFFICE OF THE DISTRICT ATTORNEY
210 W. Temple Street, Room 1800
Los Angeles, CA 90012

OFFICE OF THE ATTORNEY GENERAL
3580 Wilshire Boulevard
Los Angeles, CA 90010

THE HONORABLE LESLIE W. LIGHT
Los Angeles Superior Court
West District
1725 Main Street
Santa Monica, CA 90401

COURT OF APPEAL
SECOND APPELLATE DISTRICT,
DIVISION TWO
3580 Wilshire Boulevard, Room 301
Los Angeles, CA 90010

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 11th day of July, 1988, at Los Angeles, California.

TERRY RICE

Terry Rice

APPENDIX D

ORDER DENYING REVIEW
AFTER JUDGMENT BY THE COURT OF APPEAL
2nd District, Division 2, No. B028330
S006388

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

PEOPLE
v.
SCOTT JONATHAN CORWIN

SUPREME COURT FILED AUG 25 1988 Clerk DEPUTY

Appellant's petition for review DENIED.

LUCAS, Chief Justice

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On October 24, 1988, I served the within Petition for Writ of Certiorari in re: "Scott Jonathan Corwin v. People of the State of California" in the United States Supreme Court, October term, 1988, No. .....

On the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

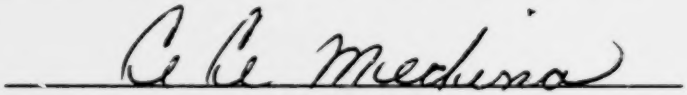
Office of the District Attorney
210 W. Temple Street, Room 18000
Los Angeles, CA 90012

Office of the Attorney General
3580 Wilshire Boulevard
Los Angeles, CA 90010

All Parties required to be served have been served.

I certify, under penalty of perjury, that the foregoing is true and correct.

Executed on October 24, 1988, Los Angeles, California



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Supreme Court, U.S.
FILED
JAN 4 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-700

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

SCOTT JONATHAN CORWIN,
Petitioner,

VS.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

SUPPLEMENTAL PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

Law Offices of
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A Professional Corporation
MICHAEL D. MARCUS
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No. 88-700

In the Supreme Court
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SCOTT JONATHAN CORWIN,
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SUPPLEMENTAL PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

EXISTENCE OF SIMILAR CASE ON COURT DOCKET

Pursuant to United States Supreme Court Rule 22.6, Scott Jonathan Corwin, Petitioner, respectfully advises the Court that *Cook v. United States,* No. 88-716, which is on the Court's docket for January 6, 1989, appears to contain substantially similar facts and presents a question which is comparable to the first question presented in Petitioner's Opening Brief for a Writ of Certiorari.

Respectfully submitted,

COLEMAN & MARCUS
A Professional Corporation

By: MICHAEL D. MARCUS
Attorneys for Petitioner
Scott Jonathan Corwin

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On January 3, 1989, I served the within Supplemental Petition for Writ of Certiorari in re: "Scott Jonathan Corwin vs. People of the State of California" in the United States Supreme Court, October Term, 1988, No. 88-700;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

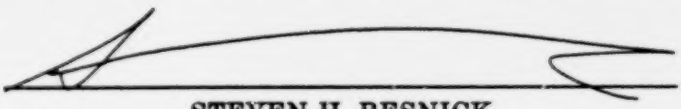
Office of the District Attorney
210 W. Temple Street, Room 18000
Los Angeles, California 90012

Office of the Attorney General
3580 Wilshire Boulevard
Los Angeles, California 90010

All Parties required to be served have been served.

I certify, under penalty of perjury, that the foregoing is true and correct.

Executed on January 3, 1989, at Los Angeles, California



STEVEN H. RESNICK